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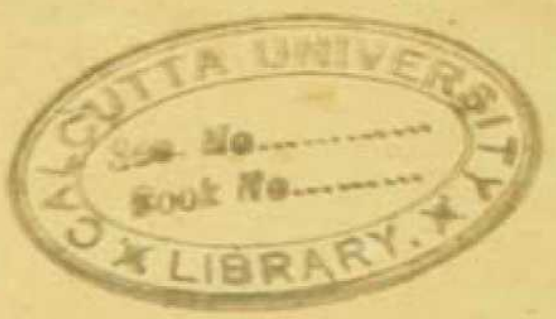

HINDU LAW OF EVIDENCE

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HINDU LAW OF EVIDENCE

OR

A COMPARATIVE STUDY OF THE LAW OF EVIDENCE ACCORDING TO THE *SMRTIS*

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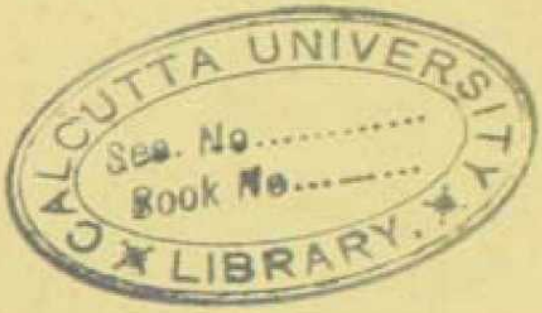

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PUBLISHED BY THE
UNIVERSITY OF CALCUTTA
1933

BCU 2396

PRINTED BY BHUPENDRALAL BANERJEE
AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA

Gs 3599

Reg. No. 552B.—Sept$_{s}$, 1933—E.

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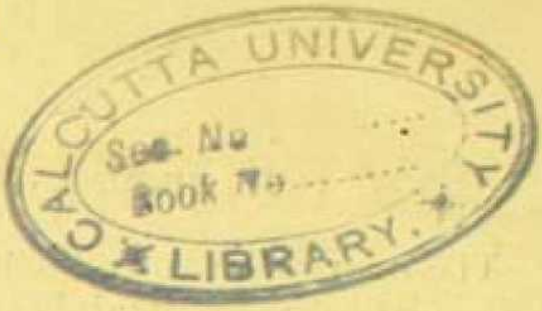

PREFACE

The subject 'Hindu Law of Evidence' has not till now been systematically treated by any scholar of repute. Julius Jolly has thrown some light on the subject by his valuable notes on many passages of Viṣṇu, Nārada and Bṛhaspati but has not said anything about it in his great work 'Outlines of an History of the Hindu Law' (Tagore Law Lectures, 1883). Dr. Priyanath Sen's contribution on the subject consists of two chapters (Chs. IV and XIII) in his 'Hindu Jurisprudence' (Tagore Law Lectures, 1909) and consequently lacks necessary details. Mr. K. P. Jayaswal whose reputation as a writer on ancient Indian topics is well established has not given any serious attention to this subject, though there are some articles from him which are extremely useful to all students desiring to make a critical study of the Hindu Law in any of its branches. Dr. P. N. Banerjea in his 'Public Administration of India,' has merely touched on the subject. The treatment of the topic by B. Guru Raja Rao in his small book 'Ancient Hindu Judicature' is almost in outlines and not at all elaborate. Mr. P. V. Kane in his famous edition of the Vyavahāramayūkha has introduced some learned discussions regarding many points of the Law of evidence as prevailed in ancient India but they are in the shape of notes only and as such fragmentary. Mahāmahopādhyāya Dr. Ganganath Jha has some valuable observations on the subject embodied in his pamphlets 'Studies in Hindu Law' but he has not yet given any systematic treatment to it. I have got to walk therefore over a track which though not devoid of light is mostly untrodden. I have derived, however, immense help from the works of the scholars named above as well as from the notes and translations of other writers.

The instruments of evidence for ascertaining truth, according to our books, are mainly three—witnesses, documents and possession. Another process recognised for this purpose is ordeal and it is to be resorted to in the absence of all these three. I wrote a short thesis mainly on 'witnesses,' the first of these instruments, in 1920. It was entitled 'An Enquiry about the Hindu Law of Evidence' and was submitted and approved for the Griffith Memorial Prize of 1921.[1] I have since then been carrying on my investigations in the subject and the present thesis is an outcome of it. There have been many changes and much revision in the first part of this thesis also, which was written about 1920, in the light of the further materials that I have been able to collect during the last five or six years.

The sources of my information have been principally the *smṛtis* as well as various commentaries and digests. The *smṛtis* pronounce the law and the commentaries and digests work it out in detail by their interpretations and attempts at reconcilement of apparent conflicts. Thus the importance of the commentaries and digests cannot be minimised. The method followed by me is briefly this :—I have first of all quoted or referred to original texts to illustrate a point of law and then noticed the different views of commentators and digest-writers regarding them. Where possible I have tried to arrive at definite conclusions and compare them with the practices of different systems of jurisprudence, ancient and modern.

I have consulted also the works on Artha and Nīti. The Arthaśāstra of Kauṭilya and the Śukranītisāra have been extensively used by me. It is rightly believed that Kauṭilya was a practical man and knew administration. The importance of his work, therefore, is immense. I have tried to present the views embodied in the works used by me with an eye to chronology. I have accepted the views of recognised scholars like Bühler,

[1] Published in the Journal of the Department of Letters (Calcutta University), Vol. XI.

Jolly, Jayaswal and Kane regarding dates. It deserves to be noted here that there is a difference of opinion regarding the date of Kauṭilya's Arthaśāstra among scholars. Jolly places it in the 3rd century A.D. while Indian scholars like Jayaswal, Aiyanger, N. C. Banerji and others consider it to be the work of an author who flourished some centuries before Christ. There are arguments on both sides. The arguments in favour of the earlier date seem to be stronger.

A very powerful writer on law about whom very little has been said is Viśvarūpa. He is the reputed author of the Bālakrīḍā, a commentary on the Yājñavalkyasmṛti which has recently been published. Vijñāneśvara holds him in great respect and refers to him by the term *ācārya*.[1] He also acknowledges his indebtedness to him in the introductory verse of the Mitākṣarā. T. Ganapati Śāstrī identifies him with Sureśvarācārya and places him in the 8th century A.D.[2] He is largely quoted by nearly all later digest-writers. Jīmūtavāhana sometimes criticises though very often defends him. A very important point to be noted in this connection is that the views embodied in the Bālakrīḍā on many topics do not coincide with those expressed on the very same topics and said to be Viśvarūpa's in the digests. This may give rise to a surmise that the author of the Bālakrīḍā and the Viśvarūpa referred to in the digests were different persons. One Viśvarūpa is mentioned by Asahāya, the earliest of the commentators. But the manner in which he is mentioned (he is mentioned along with Manu and Nārada)[3] indicates that Asahāya refers to the text-writer Viṣṇu by this name.

After the establishment of the British rule in India the old national system of law regarding evidence has not been retained. Consequently the decisions of modern courts have wrought no

[1] Mit. II. 80.

[2] Introduction to the Bālakrīḍā (Trivandrum).

[3] तथा शास्त्रं मनुनारदविश्वरूपात्मकम्—Asahāya on Nar. I, 15.

changes or modifications in the old laws of our country particularly relating to evidence and so the discussions contained in these decisions do not enter into the scope of my study. My essay is intended to help the understanding of the spirit of the law of evidence as it was in force down to a very recent age throughout India as a whole and not in a particular locality or at a particular period.

I should take here the opportunity of expressing my best thanks to the gentlemen through whose kind help I could get free access to several libraries for using published works and specially the manuscripts lying therein. I should particularly mention the name of Mr. Gopinath Kaviraj, M.A., Principal of the Oriental Department of the Queen's College, Benares, who practically placed the vast collection of manuscripts of his College at my disposal for some time. Next occurs to me the name of Pandit Saradacharan Smṛtitirtha, Sabhāpaṇḍit of the Maharaja of Cossimbazar who very kindly lent me a manuscript of the Vyavahāramātṛkā of Jīmūtavāhana. The extant published text is so full of misprints and misreadings that without the help of this manuscript it would not have been possible for me to understand the views of Jīmūtavāhana at all. I am also not less indebted to Pandit Dwarikanath Nyāyaśāstrī, Sabhāpaṇḍit of the late Raja Vinay Krishna Deb, Bahadur of Sobhabazar, Calcutta, and Pandit Janakinath Sāhityaśāstrī, Librarian of the Sanskrit Sāhitya Pariṣad, for lending me the manuscripts of several published and unpublished Sanskrit treatises.

I shall be failing in my duty if I do not acknowledge my debt of gratitude to Mr. A. C. Ghatak, M.A., Superintendent of the Calcutta University Press, and his staff for their uniform courtesy and sympathetic co-operation in speeding the work through. I must also thank my pupil Mr. Kunjagovinda Goswami, M.A., Research Fellow, Calcutta University, for preparing the Index.

AMARESWAR THAKUR

SOURCES OF INFORMATION

Ṛgveda.
Mahābhārata.
Gautama Dharmasūtra with Haradatta's commentary (Ānandāśrama).
Gautama Dharmasūtra with the commentary of Maskari (Mysore).
Manu with the commentaries of Medhātithi, Kullūka and others (Bengal).
Āpastamba with Haradatta (Mysore).
Bodhāyana with commentary.
Viṣṇusmṛti (Bib. Indica).
Vaśiṣṭhasaṁhitā (Bengal).
Nāradasmṛti with Asahāya's commentary (Bib. Indica).
Yājñavalkya with Mitākṣarā (Nirnayasagar Press, Bombay).
Yājñavalkya with Aparārka (Ānandāśrama).
Yājñavalkya with Viśvarūpa's Bālakrīḍā (Trivandrum).
*Yājñavalkya with Mitramiśra's commentary.
*Subodhinī on the Mitākṣarā (Vyavahārādhyāya).
Bālaṁbhaṭṭi on the Mitākṣarā (Benares).
Kātyāyanamatasaṁgraha (Calcutta University).
Śātātapasaṁhitā (Calcutta).
Arthaśāstra of Kauṭilya (Shama Śāstrī).
Arthaśāstra of Kauṭilya (Ganapati).
Śukranīti (Calcutta).
Nītivākyāmṛta (Bombay).
Rājanīti Ratnākara, K. P. Jayaswal (Patna).
Vyavahāramātṛkā (Calcutta).
Smṛticandrikā (Mysore).
Vīramitrodaya (Calcutta).

* In manuscripts.

Vyavahāramayūkha (P. V. Kane).
Vyavahāramayūkha (M. G. Barke).
Parāśaradharmasaṁhitā (Bombay).
Vivādacintāmaṇi (Bombay).
*Vyavahāracintāmaṇi.
Vyavahāratattva of Raghunandana (Calcutta).
*Vyavahāratattva of Nīlakaṇṭha.
*Vivādacandra.
*Vivādatāṇḍava.
Vivādaratnākara (Calcutta).
Vivādārṇavasetu (Benkateswar Press).
*Vivādārṇavabhañjana.
*Nṛsiṁhaprasāda.
*Vyavahārāloka.
Bühler's Translation of Manu (S. B. E., Vol. XXV).
Dr. Ganganath Jha's translation of the Medhātithibhāṣya of Manu (Calcutta University).
Translation of Yājñavalkya with Mitākṣarā, by Colebrooke.
Jolly's translation of the *smṛtis* of Nārada and Bṛhaspati (S. B. E., Vol. XXXIII).
Jolly's translation of Viṣṇusmṛti (S. B. E., Vol. VII).
Translation of Vasiṣṭha and Bodhāyana (S. B. E., Vol. XIV, Pt. 2).
Translation of Gautama and Āpastamba (S. B. E., Vol. II).
Translation of Kauṭilya's Arthaśāstra (Shama Śāstrī).
Vedic Index, Macdonell and Keith.
Code of the Gentoo Laws.
Outline of an History of the Hindu Law (Tagore Law Lectures, 1883), Jolly.
Hindu Jurisprudence (Tagore Law Lectures, 1909), P. N. Sen.
The History of Smṛti in Bengal and Mithila (J. A. S. B., Vol. XI, No. 9).

* In manuscripts.

Hindu Judicature, B. Guru Raja Rao (Madras).
Ancient Indian Polity, Ayangar.
Studies in Hindu Law, Dr. Ganganath Jha.
Hindu Polity, K. P. Jayaswal.
Best on Evidence.
Taylor on Evidence.
Goodeve on Evidence.
Bentham's Judicial Evidence.
Woodroffe and Ameer Ali, The Law of Evidence as applicable to British India.
Śabdakalpadruma.
Corpus Inscriptionum Indicarum, Vol. III.
Imperial Gazetteer, Vol. II.
Asiatic Researches, Vol. I.
Indian Antiquary.
Administrative System of the Mahrattas, S. N. Sen (Calcutta University).
Encyclopædia of Religion and Ethics, Vol. IX.
Calcutta Weekly Notes.
Roman Law, Lord Mackenzie.
Maine's Ancient Law.

LIST OF MANUSCRIPTS USED

Mitramiśra's commentary on Yājñavalkya, Benares Queen's College.

Viśveśvara's Subodhinī, a commentary on the Mitākṣarā (Vyavahārādhyāya), Benares Queen's College.

Dalapati's Nṛsiṁhaprasāda, Benares Queen's College.

Vyavahāratattva of Nīlakaṇṭha, Benares Queen's College.

Vyavahārāloka of Gopāladāsa, Benares Queen's College.

Vivādārṇavabhañjana, Benares Queen's College.

Vivādārṇavasetu, Sanskrit Sāhitya Pariṣad, Calcutta.

Vyavahāracintāmaṇi, Sanskrit Sāhitya Pariṣad, Calcutta.

Vivādacintāmaṇi, Sanskrit Sāhitya Pariṣad (Calcutta).

Vivādatāṇḍava, Dwarikanath Nyāyaśāstrī of Calcutta.

Vyavahāramātṛkā, Saradacharan Smṛtitīrtha of Cossimbazar.

ABBREVIATIONS USED IN THE FOOT-NOTES

Āpas.	for	Āpastamba.
Bṛ.	,,	Bṛhaspati.
Gau.	,,	Gautama.
Kau.	,,	Kauṭilya.
Kāt.	,,	Kātyāyana.
Kul.	,,	Kullūka.
May.	,,	Mayūkha.
Medh.	,,	Medhātithi.
Mit.	,,	Mitākṣarā.
Nār.	,,	Nārada.
Pds.	,,	Parāśara Dharma Saṁhitā.
Sc. or Sm. ch.	,,	Smṛticandrikā.
Śuk.	,,	Śukranīti.
Vas.	,,	Vaśiṣṭha.
V. bālam.	,,	Vyavahārabālambhaṭṭi.
Vi. ch.	,,	Vivādacintāmaṇi.
Vi. tān.	,,	Vivādatāṇḍava.
Vi. setu.	,,	Vivādārṇavasetu.
Vīram.	,,	Vīramitrodaya.
V. loka	,,	Vyavahārāloka.
Viṣ.	,,	Viṣṇu.
Vm.	,,	Vyavahāramātṛkā.
Vt.	,,	Vyavahāratattva.
Vy. ch.	,,	Vyavahāracintāmaṇi.
Yāj.	,,	Yājñavalkya.

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HINDU LAW OF EVIDENCE

INTRODUCTORY

The instances of application of the laws of evidence cannot be definitely traced in the ancient Vedic literature. It is true that the term *jñātṛ* interpreted by Zimmer as 'witness' occurs in two passages of the Atharvaveda and one of the Sāṁkhāyana Āraṇyaka. There is a clear reference to exculpatory oath in the Ṛgveda and it has been suggested that the practice of ordeal, the divine mode of proof, is also referred to there in the story of Dīrghatamas (I. 158. 4) and in another passage (VII. 53. 22). But this suggestion according to some scholars seems to be inadmissible. The reference to fire ordeal seen by some scholars in a hymn of the Atharvaveda (II. 12) has been disapproved by others. It is not till we come to the Brāhmaṇa literature that clear references to oath and ordeal are met with. The Pañcaviṁśa Brāhmaṇa of the Sāmaveda relates the story of Vatsa who being accused by his step-brother of being the son of a Śūdra woman established the purity of his origin by walking through the fire unharmed. According to Weber the balance ordeal is referred to in the Śatapatha Brāhmaṇa. The ordeals, references to which we thus get and some of which cannot be doubted, seem to have been after all extra-judicial and voluntary. It is in the Chāndogya Upaniṣad (VI. 16. 1) that we find mention of a judicial ordeal. The ordeal referred to here is one with glowing axe for deciding a case of theft. So far as the Dharmasūtras are concerned, the earliest of them, it appears, did not much think of the system. Gautama is silent about

ordeal though he mentions oath and Āpastamba speaks of it in a cursory manner. It is only in the later juristic literature that we find the subject fully developed.[1]

As to witnesses and trials by depositions we get clear references to them even in the earliest of the Sūtras. In Gautama's manual which is regarded, not without reason, as the oldest of the Dharmasūtras now extant, we have one whole chapter (Chap. XIII) devoted to the procedure relating to the calling in and examination of witnesses, exculpatory oaths, punishment of perjured witnesses and sanction of conditional perjury. We translate below the whole chapter to enable the reader to form his own judgment about it which is of great historical importance as we find that similar procedure is adhered to in later codes such as the Manusaṁhitā, treatises of Viṣṇu, Vasiṣṭha, Nārada and Bṛhaspati :

" In disputes truth is to be ascertained from witnesses. Witnesses should be many, above reproach so far as their own actions are concerned and such whom the king may trust. They are to be free from partiality to and malice against either of the parties. Śūdras even endowed with such qualifications may act as witnesses. A Brāhmaṇa not formally adduced to give evidence should not be accepted as a witness by the king through the request of a non-Brāhmaṇa. Witnesses shall not speak without being assembled and without being asked.[2] If they fail to speak (the truth) or do not answer the questions put to them, they are guilty of a crime. Truth-speaking leads to heaven and the contrary to hell. Even non-appointed witnesses may speak (where ends of justice cannot be met otherwise). There is no hard and fast rule in cases of violence

[1] See the references collected in the Vedic Index and in the Encyclopædia of Religion and Ethics, Vol. IX.

[2] According to Maskari this *sūtra* (XIII. 6) means—witnesses though assembled in court should not say anything until they are questioned by the king.

and regarding what has been said inadvertently.[1] In the event of moral laws or rules relating to worldly matters being violated demerit is acquired equally by the witnesses, the members of the tribunal, the king and the doer of the mischief. When qualified witnesses are wanting, truth is to be ascertained by *śapatha* or oath. This *śapatha* in the case of a non-Brāhmaṇa shall take place before an imaged deity or in the assembly of the king and the Brāhmaṇas. A witness who gives false evidence in regard to a small animal kills ten (of that kind regarding which he has lied). The consequence of telling a lie in respect of a cow, horse, man or piece of land is ten times more in each successive case. Or, by giving false testimony regarding land a witness kills all human beings (*i.e.*, commits the same sin as is committed by killing all men). Seizing or forcibly taking possession of a piece of land leads to hellish abode. False testimony in respect of waters and adultery produces the same consequence. Falsehood spoken (in the course of a trial) in regard to honey or clarified butter gives rise to the same sin as that for small animals. By giving false evidence for a piece of cloth, gold, paddy and the Vedas[2] one incurs the same sin as for a cow. False evidence for a conveyance is as sinful as that for a horse. When it is found that a witness has given false evidence, he should be censured and punished by the king. But whenever the life of a man would be lost by true evidence, a witness is free from blame if he gives false evidence. Such a lie, however, should not be told for the sake of saving the life of a wicked man. The king himself or a learned Brāhmaṇa should act as the judge.[3] The complainant should approach the judge seated on an elevated seat.[4] When the

[1] The meaning of this *sūtra* (XIII. 11) is not clear.

[2] If one attributes non-learning of the Vedas to one who has learned them.—*Maskari.*

[3] This is in accordance with Haradatta.

[4] The real import of this *sūtra* (XIII. 27) is that the judge should not take the initiative in beginning a law-suit.

defendant keeps himself absent or the witnesses of the complainant do not make their appearance the judge should wait for a year.[1] But he is not to do so (*lit.* he is to commence the trial very soon) in disputes concerning a cow, bull, women or marriage. He should decide at once those cases also which are very urgent.[2] Speaking the truth before the judge constitutes the highest virtue."

It is an accepted principle of Hindu Law that the main duty of the king is to uphold the rule of right against the rule of might by an impartial administration of justice and protection of the rights and interests of the people. The evil effects of indiscriminate judgment of cases are stated in a passage of the Bṛhadāraṇyaka Upaniṣad[3] and narrated more popularly by Manu and Nārada thus[4] :—"If the king did not, without tiring, inflict punishment on those worthy to be punished, the stronger would roast the weaker, like fish on a spit ; the crow would eat the sacrificial cake and the dog would lick the sacrificial viands and ownership would not remain with any one, the lower ones would usurp the place of the higher ones." "An honest person becomes a thief and a thief becomes an honest person ; Māṇḍavya though not a thief was proved to be one through bad trial." The Indian law-givers of the past thus fully recognised that the primary care of the Law is the protection of innocence and punishment of guilt. It was further recognised by them that a person might be doing wrong either by omission or by commission. Kātyāyana distinctly says that a charge may take either of the two forms : (1) 'he is unwilling to do justice' and (2) 'he does an act of injustice.'[5] The Mitākṣarā

[1] *i.e.*, the trial is to go on after one year.

[2] *i. e.*, matters a delayed adjudication of which may result in loss or damage.

[3] I. 4. 14.

[4] Manu, VII. 20 and 21, Nār., I. 42.

[5] न्याय्यं स्वं नेच्छते कर्तुमन्याय्यं च करोति यः ।

—Mit. on Yāj., II. 5.

illustrates the point very clearly. Thus when a man comes to the court and says, 'So and so has taken such and such things from me and will not restore them,' then the person against whom the charge is brought may be said to have done a wrong by omission. But when the complainant says, 'So and so has forcibly taken possession of my land,' then the person charged may be regarded to have done a wrong by commission.[1] Now if the paramount duty of the king is to give relief to the really wronged, then truth must first of all be ascertained. Evidence being the determining factor of truth in all matters that come up for decision before a court, it becomes the most essential thing for the tribunal to see that the instruments through which such evidence comes are most reliable, for otherwise impartiality and accuracy of decision cannot be secured. Thus we can understand what led the ancient law-makers of India to make great efforts by devising various plans to ensure the veracity of witnesses and the completeness of the proofs of documents and possession. They insist first of all that the examination of witnesses should be on oath to be administered in a form which may well be calculated to bind their conscience. They recognise also the utility of the principle that such an examination should be *viva-voce* and in open court. They declare only those people who have the guarantees of truth in them—such as those who are householders, have sons and wives, and are truthful by nature or from moral considerations or on account of religious fervour which acts as a check on falsehood —as competent to act as witnesses. They adopt the principle of exclusion—a principle which though not sound from the practical point of view, is enunciated with the best of purpose. It is intended to render disqualified all those whose testimony has any chance of proving untrustworthy from personal interest in the matter in dispute or in the result of the suit or from any other visible cause such as intellectual weakness, unsoundness

[1] Mit. on Yaj., II. 5.

of mind, fickleness of nature, deficiency or want of religion and character, moral turpitude and the like. They want to check falsehood in a witness by prescribing severe punishments for perjury. Another plan resorted to by them for preventing misdecisions consists in exacting a plurality of witnesses. They hold that ordinarily the evidence of one or two witnesses cannot be admitted to prove or disprove a fact.

The Hindu Law of Evidence has other noteworthy features also. It knows how to enforce the attendance of witnesses and compel them to give evidence before a court of justice. It excludes derivative or second-hand evidence as far as possible and insists on having the best or direct evidence. It has important rules as to 'burden of proof.' It is recognised that both the parties cannot simultaneously adduce evidence. The party who asserts an affirmative is to be put on proof and the party who denies an allegation has not to prove anything because a negative is incapable of proof. It is further recognised that evidence should correspond with allegations and must be confined to the points in issue. There are rules also for the weighing of conflicting evidence. The credit due to the testimony of a witness is to be determined mainly from his manner and deportment in delivering it. The capacity of a witness to narrate facts faithfully depends, according to our law-givers, on mature intellect, sober-mindedness and good memory. The modes of impeaching his credit are mainly three : (1) by disproving his testimony, (2) by proof of the inconsistent statements made by him, and (3) by evidence of bad reputation as to his character. Not only oral evidence but circumstantial evidence also is to be regarded as a basis of decision. Our jurists, we shall see, feel the necessity of great caution being taken in dealing with such evidence.

Coming to written proofs we see that their superiority in permanence and trustworthiness to verbal proofs is admitted by some of our text-writers in all cases where evidence can be pre-appointed. There are precise rules for writing a document

and the non-observance of them is held to vitiate it. A document is evidence by itself and no extraneous evidence is necessary for the proof of its contents. When the authenticity of a document is doubted it can be established by the evidence of the subscribing witnesses and of the persons who were present at the time of its execution, by circumstantial evidence or by a comparison of the writing of the document with the handwriting of the supposed writer. When a document is lost or destroyed, its copy may be admitted in evidence. This shows the recognition of the principle by our law-givers that the secondary evidence of a document is admissible in the absence of primary evidence, *i.e.*, the document itself. It is further enjoined that a document in order to be admissible in evidence should be produced from proper custody. An extraordinary amount of confidence is placed in the public documents—*śāsana*, *jayapatra*, etc., evidently on account of their coming from the highest authority in the land. It is held that the presence of the royal seal in them is a sufficient proof of their authenticity.

A word about the proof of possession. The importance of this kind of proof is recognised to be very great in disputes regarding the ownership of properties—movable and immovable. The title of a man to a property is not put on a safe footing till he gets possession of the same. If a man remains without possession of his property for a long time, it may give rise to the presumption of subsequent transfer. So one who has acquired title to a property should insist on having its possession. Possession in order to be proof of right must be uncontradicted and uninterrupted. It should also be based on legitimate title. The Hindu law-givers are very emphatic on the point that when title is positively known to be absent, possession for a long period even will not serve as a proof of ownership. This enquiry into title is superseded, however, by possession which is held through three successive generations, *i. e.*, from time immemorial. Here the existence of title will be presumed from long enjoyment. It should be noted that possession and

acts of ownership are not regarded in the Hindu law as an equivalent of title but only as presumptive evidence thereof.

These are some of the broad principles of the Hindu Law of Evidence. We shall see that our law-givers advocate investigating and determining facts coming in question in courts of justice just in the same way as doubtful matters are investigated and determined by the general bulk of the people in their daily business. They have introduced certain artificial principles from motives of policy and expediency only. From what we shall see in the next few chapters it will be further clear that though some of the intricacies of the modern age were not known to our text-writers and commentators, the law which they evolved without any outside influence was quite of a practical character and as much developed in many directions as the similar law of any other country.

CHAPTER I

Oral and Circumstantial Evidence

Modes of Proof.

Gautama mentions only witnesses by means of which truth is to be ascertained in disputed cases.[1] According to Āpastamba modes of proof are mainly two—*liṅga* (inference) and *daiva* (ordeals).[2] *Liṅga* has been taken to mean *anumāna* by Haradatta.[3] It is particularly in the older portions of the legal manual of Viṣṇu that we find that truth respecting a question of fact is to be ascertained in matters of litigation by three means, *viz.*, documents, witnesses and ordeals.[4] Yājñavalkya has in addition another mode of proof, *viz.*, *bhukti* or ascertainment of actual possession.[5] Vaśiṣṭha does not mention ordeal and recognises only three kinds of proof.[6] Nārada and Bṛhaspati declare 'proof' primarily to be two-fold : human and divine. By divine proof is meant the ordeal by balance and the other modes of divine test, and human proof consists of witnesses, documents and *anumāna* according to Bṛhaspati and of witnesses and documents according to Nārada.[7] Nārada in a later verse recognises, however, the proof of possession (*bhukti*) and its importance.[8] Bṛhaspati's *anumāna* is implied in the *bhukti* of Yājñavalkya as interpreted by Aparārka.[9] This view is accepted by Parāśara Dharmasaṁhitā as well as by Raghunandana.[10] But the accuracy of this seems doubtful from two other verses of Bṛhaspati. In one of them he takes

[1] Gau. XIII. 1.
[2] II. 11. 29. 6.
[3] लिङ्गतोऽनुमानेन ।
[4] VI. 23.
[5] Yaj. II. 22.
[6] Vas. XVI.
[7] Nār. II. 28; Viram., p. 110.
[8] Nār. IV. 69.
[9] Apar., p. 628.
[10] Pds., p. 88, Vt., p. 26.

anumāna as an equivalent of *hetu* or *tarka*,[1] *i. e.*, reasoning, and in the other clearly sets forth the relative importance of *anumāna*, *bhukti*, witnesses and documents as means of proof.[2] It is stated in this latter verse that oral evidence of witnesses is of superior cogency than *anumāna* ; a written document is to be considered a better means of ascertaining the truth than oral evidence of witnesses, and undisturbed possession for three successive generations is of greater legal force than *anumāna* and the evidences furnished by both documents and witnesses. Some light, however, can be had from some *smṛti* texts as regards the correct meaning of the term *anumāna*. Nārada and Kātyāyana while saying that the modes of proof are principally three, *viz.*, witness, document and possession, incidentally mention *yukti* along with them[3] which implies an enumeration, specification or rather consideration of the several aspects of a question such as the circumstances created by time, place, etc., and is to be employed specially when a debtor does not pay his debt even when he is repeatedly urged by the creditor to do so.[4] According to Vācaspati *anumāna* is only another name for *yukti* of this description.[5] Devaṇabhaṭṭa in his Smṛticandrikā seems not to take *anumāna* as a synonymous term for *yukti* but as implying 'an inference drawn from the circumstances of a case, these circumstances, such as carrying a fire-brand, etc., being the indications of an act done.[6] Thus according to him *anumāna* is a later stage than, or rather the result of, *yukti* in the process of reasoning. *Anumāna* may or may not signify exactly the same thing as *yukti* does but that it is not included

[1] अनुमानं विदुर्हेतुस्तर्कं चेति मनीषिणः ।—Sc., p. 119.

[2] Vt., p. 49.

[3] चोदना प्रतिकालश्च युक्तिलेशस्तथैव च (Nār.)—Vy. ch. (in manuscript). For Kat.'s text, see Pds., p. 91.

[4] चोदना प्रतिघाते तु युक्तिलेशैः समन्वियात् । देशकालार्थसम्बन्धपरिमाणक्रियादिभिः ॥ Pds., p. 91 ; चोदना प्रतिकालक्षमसुकं मे धनं देहीति प्रेरणा (Vy. ch.) Sc., p. 118.

[5] अनुमानापरव्यपदेशाभिर्युक्तिभिः—Vy. ch.

[6] अनुमानमुल्काङ्कादिज्ञानम्—Sc., p. 23.

in *bhukti* becomes certain. The views noted above regarding *anumāna* and *yukti* show on the other hand the recognition by our law of the principle that 'if the circumstances are such as to generate strong persuasion of certain facts existing or having occurred, a case may be decided solely on the evidences furnished by those circumstances,' or, to put it tersely, that a fact can be established by direct and positive evidence as well as by 'cogent and irresistible grounds of presumption.' Thus we see that Nārada mentions six different kinds of proceedings in which witnesses may be dispensed with and mere inference from the circumstances is sufficient to prove the guilt of the persons accused. He says, "It should be known that one carrying a fire-brand in his hand is an incendiary ; that one taken with a weapon in his hand is a murderer ; and that where a man and the wife of another man seize each by the hair, the man must be an adulterer. One who goes about with a hatchet in his hand and makes his approach may be recognised as a destroyer of bridges ; one carrying an axe is declared a destroyer of trees and one whose looks are suspicious is likely to have committed an assault."[1]

Relative Importance of the Human Modes of Proof.

It has been seen above that according to Bṛhaspati *anumāna* is the worst kind of proof, and as between witness, document and possession, document prevails over witness, and possession prevails over both witness and document. In another place he says, 'A document is never to be overruled by witnesses or by an oath.'[2] A verse of Kātyāyana and a *sūtra* of the Nītivākyāmṛta also express exactly the same idea.[3] The statement regarding the superior worth of

[1] Nār., IV. 172-74.

[2] न जातु क्षीयते लेख्यं साक्षिभिः शपथेन वा ।—Sc., p. 151.

[3] न दिव्यैः साक्षिभिर्वापि क्षीयते लिखितं क्वचित् ।—Sc., p. 151 (Kat.).
न लेखाद् वचनं प्रमाणम् । (Vyavahāra Samuddesa of Nītivākyāmṛta, Sutra 60.)

documentary evidence must be understood to relate, Bṛhaspati makes it clear, to cases of pledge, sale and gift where evidences can be pre-constituted by the appointment of witnesses as well as by writing.[1] Nārada shows the relative value of the three human kinds of proof in two verses which are rendered as follows :—

"A document has many blemishes, witnesses are free neither from old age nor from death. Uninterrupted possession is the surest mode of proof inasmuch as it is not connected with any material object (*i.e.*, decay)."[2]

"A document is valid at all times. Witnesses can give valid evidence as long as they live. Possession becomes valid through the lapse of time. This is the injunction of the *śāstras*."[3]

The commentator Asahāya has the following gloss upon these verses :—'A document carefully preserved can furnish valid evidence even after the creditor, the debtor and the witnesses have died. Thus it can substantiate a claim raised by the son, grandson or more remote descendant of the original owner. Witnesses can testify to a fact only in their life-time. Even while they live, a document is a better kind of proof than they themselves are. On the other hand a creditor may recover his loan even after four or five generations have passed away, *i.e.*, even after the lapse of an immeasurable period on the strength of uninterrupted possession.'[4] In the opinion of Kātyāyana the efficacy of these three kinds of proof differs according to the subjects of litigation. Thus writing (*i.e.*, documentary evidence) and neither oath nor witness is the only proof in regard to the time-honoured institutions of guild, corporation and company; oral evidence of witnesses, and

[1] आधाने विक्रये दाने लेख्यं तु बलवत्तरम् ।—Vi. tan.
[2] IV. 73. [3] IV. 75.
[4] Asahāya on Nār. IV. 75. See also S. B. E., Vol. XXXIII, p. 59 fn.

neither writing nor oath, is to be resorted to in cases of non-payment of debts and wages, disputes regarding ownership, recission of sale and purchase, gambling and betting; disputes regarding an entrance, roads, enclosures and drains should be decided by having recourse to the proof of possession and neither witnesses nor documents will be of any use there.[1]

Divisions of Vyavahāra :
Its Relation with Witnesses.

We have a verse from Nārada which seems to have a special significance as to the divisions of judicial proceedings. We quote the main part of the verse below :—

Dharmaśca vyavahāraśca caritram rājaśāsanaṁ catuṣpād vyavahāro.....[2]

Professor Aiyangar renders the verse thus—"Canon, judicial procedure, general acceptance of usage and royal edicts form the fourfold basis of the subject of litigation."[3] This rendering is open to dispute, for it is clear from the commentary of Asahāya that Nārada's expression *catuṣpād* (four-footed) signifies the four divisions of judicial procedure into *dharma, vyavahāra, caritra* and *rājaśāsana*[4] and not the fourfold basis of the subject of litigation as Professor Aiyangar takes it. The commentary is lent support in a way by Bṛhaspati who declares that 'judgment in a doubtful matter is said to be of four sorts according as it is based on *dharma, vyavahāra, caritra* and *nṛpājñā* (command of the king).'[5] Nārada in agreement with the earliest juristic conception of *dharma*[6] goes on to say that

[1] Mit. II. 22, Sc., p. 122.
[2] Nār., I. 10.
[3] Ancient Indian Polity, p. 131.
[4] चतुर्विभागरूपत्वात् चतुष्पादो व्यवहारः।
[5] Vīram., p. 8.
[6] Ṛgveda I. X. 85. Taittirīya I. X. 11. Bṛhadāraṇyaka I. 4. 14.

witnesses are not required in *dharmavyavahāra* inasmuch as its very essence is truth.[1] Here, in the words of commentator Asahāya, though the parties have come to the court, they do not deviate from truth in their statements and as such witnesses and documents are not needed.[2] There is nothing uncommon in such a state of affairs according to Hindu ideas. The Hindu law-makers even suppose that there existed a time in which there was no *vyavahāra* at all on account of the absolute truthfulness and religious disposition of all people. We may quote here the two very simple verses one by Nārada and another by Bṛhaspati to show what a beautiful notion these law-givers had about the ancient Hindu society.

"When people were absolutely religious and veracious, there existed neither lawsuits, nor hatred, nor selfishness."[3]

"In former ages men were strictly virtuous and devoid of mischievous propensities. Now that avarice and malice have taken possession of them, judicial proceedings have been established."[4]

It is the second kind of law-suit going by the name of *vyavahāra* which rests on the statements of witnesses.[5] That is to say, when it is suspected that either of the parties has made a false statement, truth is to be ascertained with the help of judicial procedure which depends upon the evidence given by witnesses.[6] The treatise on its own admission points to a state of Hindu society when its relations became sufficiently complex. Taking it as a general observation we can well understand why ancient Vedic literature is wanting in references to formal

[1] सत्य सत्ये स्थितो धर्मः।—Nār. I. 11.

[2] Asahāya on Nār. I. 11.

According to the Mit. धर्मैव्यवहार rests on divine tests. See Mit. on Yāj. II. 96.

[3] Nār. I. 1.

[4] Vīram., p. 5.

[5] व्यवहारस्तु साक्षिषु—Nār. I. 11.

[6] See Asahāya on Nār. I. 11.

procedure of trial by courts. When society is simple, no legal convention and formalities become necessary; but when with the advance of civilisation, as we now understand it, the social relations become more and more complex and people begin to swerve from the principles of truth and righteousness for economic and other concomitant reasons, the introduction of an elaborate procedure becomes a desideratum.

Witnesses.

Bṛhaspati divides witnesses into twelve classes.[1] Six of them are described as *kṛta* and the other six as *akṛta*.[2] A *kṛta* witness is one who is appointed at the time of the transaction and requested to bear it in mind in order to be able to give evidence about it in future if necessary.[3] The *kṛta* or appointed witnesses are :

1. *Likhita*—'a subscribing witness,' *i. e.*, one by whom a document is attested. He enters in a deed his own as well as his father's caste, name and so forth and the place of his residence.[4]

2. *Lekhita*—one caused to be written. This sort of witness is entered in a deed together with the details of the agreement by the plaintiff when writing a contract of loan.[5]

The difference between a *likhita* and a *lekhita* witness is that the former writes his name, caste, etc., with his own hand

[1] Mayukha, p. 34.

[2] साक्षी द्विविधो विज्ञेयः कृत एकोऽपरोऽकृतः ।—Vīram., p. 143.

[3] साक्षित्वेन निरूपितः कृतः ।—Mit. on Yāj. II. 68. साक्षित्वेनार्थिप्रत्यर्थिभ्यां निरूपितः कृतः ।—Vīram., p. 143.

[4] जातिनामादि लिखितं येन स्वं पितरमेव च ।
निवासस्य स विज्ञेयः साक्षी लिखितसंज्ञकः ॥
—Sc., p. 184.

[5] संवित् क्रियां क्रियाभेदैः कार्यं कृत्वा ऋणादिकम् ।
प्रत्यर्थं लेख्यते यत्र लेखितः स उदाहृतः ॥
—Aparārka, p. 666.

while the latter does not do so but is made a witness and entered in a deed when a contract is made in his presence, his name being caused to be written by another person.[1]

3. *Gūḍha*—'a secret witness.' He is made to hear, standing concealed behind a wall or some such thing, distinctly what the defendant speaks concerning a certain debt and relates the statements of the defendant just as he heard them, in order to establish the claim of the complainant if the defendant tries to deny the debt in a law court.[2]

4. *Smārita*—'one reminded.' He is not entered in the deed.[3] He is invited at a transaction concerning loan, deposit or purchase and is reminded repeatedly of it by the claimant in order to keep his memory fresh and so insure the publicity of the transaction.[4] Bṛhaspati distinctly tells us that not to remind witnesses of the transaction frequently is one of the reasons for losing one's cause.[5]

5. *Yadṛcchābhijña*—'a casual or spontaneous witness.' He also is not entered in the deed.[6] He happens to be on the spot of transaction accidentally and is made a witness by the

[1] यत् पुनः...उक्तं लिखितो लेखित इत्यादि तल्लिखितस्यावान्तरभेदं स्वनामादिलिपिकर्तृत्वकारयितृत्वरूपमाश्रित्योक्तम् ।—Sc., p. 186.

[2] कुड्यव्यवहितो यस्तु श्राव्यते ऋणिभाषितम् ।
विनिश्चिते यथाभूतं गूढः साक्षी स उच्यते ॥
—Aparārka, p. 667.

[3] स्मारितः पत्रकाङ्क्षते ।—Kātyāyana in Mit. on Yāj. II. 68.

[4] आहूय यः कृतः साक्षी ऋणन्यासक्रियादिके ।
स्मार्यते च मुहुर्यस्य स्मारितः स उदाहृतः ॥
—Aparārka, p. 667.

[5] भूमेरमुक्तिर्लेख्यस्य यथाकालमदर्शनम् ।
स्मारणं साक्षिणाञ्च स्यादर्थहानिकराणि च ॥
—Sc., p. 184.

[6] अनयोः पत्रानाङ्कर्तेऽपि ।—Mit. on Yāj. II. 68. अनयोः पत्रानाङ्कर्ते साक्ष्येऽपि ।—Vīram., p. 143.

parties.[1] The material point of difference between a *smārita* and a *yadṛcchābhijña* witness lies in the fact that the former is purposely brought near the transaction and the latter makes his appearance quite accidentally.[2]

6. *Uttara*—'an indirect witness.' He is a witness who deposes to facts from the reports of others. According to Bṛhaspati he is one 'who either repeats from his own hearing or from the reports of others the previous statements of an actual witness'[3] or 'to whom is communicated by an original witness what he knows about a certain case at the time when he goes abroad or is lying on his death-bed.'[4] Julius Jolly thinks that the function of an *uttarasākṣī* was merely to corroborate the statements of other witnesses either from his own knowledge or from hearsay.[5] Mr. Kane criticises this view as incorrect. He remarks, 'if a man corroborates another from his *own knowledge* he cannot reasonably be called an indirect witness.'[6]

Nārada does not recognise the '*lekhita*' witness and thus according to him *kṛta* witnesses are of five sorts.[7]

[1] यस्तु यदृच्छयागतः साक्षी क्रियते स यदृच्छाभिज्ञः।—Mit. on Yāj. II. 68 ; क्रियमाणे तु कर्तव्ये यः कश्चित् स्वयमागतः। अत्र साक्षी त्वमत्राकस्मात्को यादृच्छिकस्तु सः॥—Aparārka, p. 667.

[2] प्रयोजनार्थमानीतः प्रसङ्गादागतश्च यः।
द्वौ साक्षिणौ त्वलिखितौ पूर्वपक्षस्य साधकौ॥
—Kāt. in Mit. on Yāj. II. 68.

[3] साक्षिणामपि यः साक्ष्यमुपर्युपरिभाषताम्।
श्रवणाच्छ्रावणादापि स साक्ष्युत्तरसंज्ञितः॥
—Vīram., p. 145.

[4] यत्र साक्षी दिशं गच्छेन्मुमूर्षुर्वा यथाक्रमम्।
अन्यं संश्रावयेत्तत्तु विद्यादुत्तरसाक्षिणम्॥
—Aparārka, p. 667.

[5] S. B. E., Vol. XXXIII, p. 80 (fn.).

[6] Mayūkha, p. 66 (Notes).

[7] लिखित-लेखितयोः स्वपरलिखनमात्रभेदादेकादश-द्वादशसंख्ययोरविरोधः॥
—Vīram., p. 145.

As to the question of the period within which the *kṛta* witnesses can give valid evidence it is laid down by Nārada that a subscribing witness (*likhita*) may testify even after the lapse of a very long period and the depositions of the reminded (*smārita*), casual (*yadṛcchabhijña*), secret (*gūḍha*) and indirect witnesses (*uttarasākṣī*) are valid if given within the 8th, 5th, 3rd and the 1st year respectively.[1] That such a rule is most arbitrary in its character is evident, and Parāśara Dharma-saṁhitā declares that this is not the real opinion of Nārada, and as such may be discarded. The opinion of Nārada, according to it, is embodied in another verse which says that the period within which a witness can give valid evidence depends upon his power of memory and a witness can testify to an event even after a long time if his memory, intellectual capacity and power of hearing are strong.[3] Thus under this rule, as observed by Asahāya, the validity of any testimony is declared independent of length of time and to depend on the competence of the witness alone.[4]

As to the *akṛta* witnesses. They know everything about the transaction and though not previously appointed can subsequently depose.[5] According to Nārada and Bṛhaspati special people only under special circumstances can be admitted as *akṛta* witnesses. Those regarded by these authorities as competent to be *akṛta* witnesses are :

1. *Grāma.*—'The people of the village.' They may give evidence without any special appointment as to what has been

[1] Nārada IV. 167-169.

[2] यत् पुनः...तत् परमताभिप्रायेणोक्तम् ।—Pds., p. 104.

[3] स्वमतमुपरि स एवाह—निर्णये कालनियमो ।—Pds., 104, and Nār. IV. 170-171.

[4] एतावतोऽवधेः प्रश्नकालनियमो न दृष्टः साक्षिणं प्रति । आभ्यामपि कालनियमप्रतिषेधः साक्षिल-क्षणानुस्मरणत्वकालेन क्रियते ।—Asahāya on Nār. IV. 170-178.

[5] अनिरूपितोऽकृतः ।—Mit. on Yāj. II. 68 ; यैन योऽर्थः प्रमितस्तत्र साक्षिलेन प्राग-निरूपितोऽपि साक्षिलेन विज्ञायोपन्यस्तः अकृतः ।—Vīram., p. 146.

anywhere spoiled or damaged in the boundary line.[1] Asahāya thinks that co-villagers are competent witnesses in all disputes regarding the transactions that have taken place in the village.[2]

2. *Prāḍvivāka.*—The term means 'the chief judge.' He may act as a witness if a fresh trial should take place of a suit decided by himself.[3] Vijñāneśvara and Mitramiśra are of opinion that the term includes all the members of the judicial assembly as well as the clerk of the court.[4] A text of Kātyāyana is their authority on this point.[5]

3. *Rājā.*—'The king.' He though ordinarily exempt, as we shall see later on, having himself heard the speeches of plaintiff and defendant may give evidence if they fall out with each other.[6] A text of Vyāsa quoted by Jīmutavāhana declares that none but the king can be a witness with regard to what he has heard from his seat of judgment.[7] Asahāya says that

[1] सुषितं घातितं यत्र सीमायाश्च समन्ततः।
अदर्शतोऽपि भवेत् साक्षी यामस्तत्र न संशयः॥
—Aparārka, p. 667 and Vīram., p. 145.

[2] यामसब्दे इत्तप्रयोजनस्य याम एव साक्षी।—Asahāya on Nār. IV. 151.

[3] निर्णीते व्यवहारे तु पुनर्न्यायो यदा भवेत्।
अध्यक्षः सभ्यसहितः साक्षी स्यात्तत्र नान्यथा॥
—Aparārka, p. 667 ; Vīram., p. 320.

[4] प्राड्विवाकग्रहणं लेखकसभ्योपलक्षणार्थम्।—Mit. on Yāj. II. 68.
प्राड्विवाकग्रहणं लेखकसभ्योपलक्षणम्।—Vīram., p. 144.

[5] लेखकः प्राड्विवाकश्च सभ्यार्थेवानुपूर्वशः।
नृपे पश्यति तत् कार्यं साक्षिणः समुदाहृताः॥
—Mit. on Yāj. II. and Vīram., p. 144.

[6] अर्थिप्रत्यर्थिनोर्वाक्यं यच्छ्रुतं भूभृता स्वयम्।
स एव तत्र साक्षी स्याद् विसंवादे तयोरपि॥
—Aparārka, p. 667.

[7] राज्ञा धर्मासनस्थेन यच्छ्रुतं तत्त्वमिच्छता।
नान्यः साक्षी भवेत्तत्र त्यक्त्वा राजानमीश्वरम्॥
—Vīram., p. 322.

the king can give testimony about an affair that has occurred in his presence.[1]

4. *Kāryābhyantara.*—'One to whom an affair has been entrusted or communicated by both the parties,' *i.e.*, one who knows the innermost secrets of both the parties.[2]

5. *Kulya.*—'A family witness.' He may act as a witness without previous appointment in law-suits concerning partition, gift or sale occurring in the family. He is an agnate of the parties, is impartial and acquainted with the rules of duty.[3]

6. *Dūtaka.*—According to Bṛhaspati he is a messenger who being sent (perhaps by the judge with a view to securing a compromise) hears both the parties and is respectable, esteemed and approved by them.[4]

It is evident that the rule about the *akṛta* witnesses which is rather an exception to the general rule was based upon two considerations : (1) necessity for evidence and (2) 'circumstantial guarantee of trustworthiness.'

It should be noted that the classification of witnesses into *kṛta* and *akṛta* is rather an improvement upon that of Manu who divides them broadly into two classes, *viz.*, *nibaddha* and *anibaddha.*[5] *Nibaddha* means 'entered in the deed' and

[1] राज्ञः पुरतो दत्तस्य राजा साक्षी।—On Nār. IV. 151.

[2] उभाभ्यां यस्य विश्वस्तं कार्यं चापि निवेदितम्।
गूढचारी स विज्ञेयः कार्यमध्यगतस्तथा॥
—Aparārka, p. 667.

[3] विभागदाने विक्रये ज्ञातिर्यत्रोपयुज्यते।
दयोः समानो धर्मज्ञः कुल्यः स परिकीर्तितः॥
—*Ibid*, p. 667.

[4] यर्थिप्रत्यर्थिवचनं ब्रूयात् प्रेषितस्तु यः।
उभयोः सम्मतः साधुर्दूतकः स उदाहृतः॥
—*Ibid*, p. 667.

The expression used by Nārada is *arthinā prahitaḥ* (one deputed by the claimant, *i.e.*, his agent.

[5] Manu VIII. 76.

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anibaddha 'not so entered though present at the transaction.'[1] Manu places these two kinds of witnesses almost on the same level as regards their eligibility to give evidence. Medhātithi remarks that *anibaddha* witnesses can be examined even when there are attesting witnesses.[2] According to him further a witness, whether *nibaddha* or *anibaddha*, need not be appointed at the time of the transaction in the fashion 'you please bear in mind the transaction, you shall be my witness, etc.,' the essential thing for his eligibility being his possessing a direct knowledge of the facts of the case.[3]

It is clear that the name *nibaddha* may be applied only to such *kṛta* witnesses as *likhita* and *lekhita*, and *anibaddha* to all other witnesses including the rest of the *kṛtas* as well as all the *akṛtas*. Mitramiśra's explanation of *anibaddha* by *akṛta*[4] is therefore only partially correct. It is probably based upon a misconception of the text of Prajāpati according to which *kṛta* and *akṛta* are equivalents of *lekhyārūḍha* (*lit.* 'one entered in the deed' and thus appearing to be the same as *nibaddha*) and *muktaka* (*lit.* 'one set free,' *i.e.*, not entered in the deed, and thus appearing to be the same as *anibaddha*).[5] That the literal meanings of *lekhyārūḍha* and *muktaka* are not applicable to the terms *kṛta* and *akṛta* is clear from the fact that all the *kṛta* witnesses are not entered in the deed and any one and every one who is not so entered cannot be admitted as an *akṛta* witness. As to their real meanings we get a clear suggestion from Devaṇabhaṭṭa, according to whom *lekhyārūḍha*

[1] अनिबद्धोऽपि लेख्यमनारूढोऽपि... ।—Medhātithi on Manu VIII. 76.

[2] अयन्तु यच्च समाधिकं लेख्यम्... ।—*Ibid.*

[3] यस्तव सन्निहितः कथञ्चिदनुभविता तं स्मर्तुमर्हस्यावयोरिममर्थमित्येवमनुक्तोऽपि भवत्येव साक्षी... ।
—*Ibid*, VIII. 74.

[4] Viramitrodaya, p. 146.

[5] साक्षी द्विभेदो विज्ञेयः कृत एकोऽपरोऽकृतः ।
लेख्यारूढः कृतो ज्ञेयो मुक्तकोऽकृत उच्यते ॥—Viram., p. 320.

Sm. Candrikā reads उत्तरोऽकृत उच्यते... ।—p. 184.

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means *likhitādi* (*likhita*, *lekhita*, *gūḍha*, etc), *i.e.*, only those who are technically called *kṛta* witnesses.[1] It may thus be asserted that by *muktaka* also are signified *grāma*, *prāḍvivāka*, *rājā*, etc., *i.e.*, only those who are technically recognised as *akṛta* witnesses by Nārada and Bṛhaspati.

It is evident that what has been stated about the classification of witnesses into *kṛta* and *akṛta* relates only to civil proceedings.

The most preliminary thing for a witness to be eligible to depose is that he must be cited by either of the parties. Manu, Nārada, Viṣṇu and Bodhāyana all agree that a person may give evidence only when called upon to do so by the suitors.[2] Nārada adds that one who volunteers to give evidence without being cited is as good as a *sūcī* (a spy or an informer).[3] From a verse of Yājñavalkya we know that the names of the witnesses had to be mentioned by the *arthī* (*i.e.*, the party on whom lay the burden of proof) in a separate list.[4] It is stated there that after the defendant has tendered his answer to the plaint of the complainant, the *arthī* should immediately write down what the evidences are in his favour.[5] The modern law also requires the submission of the list of witnesses but it should be noted at the same time that the fact of a witness not having been named in the list of witnesses is not considered an absolute ground for refusing to examine him.

Oral Evidence is to be Direct.

Manu says, "evidence in accordance with what has been seen or heard is admissible."[6] Viṣṇu also is of the same

[1] लेखाख्टो लिखितादिरित्यर्थः।—Sc., p. 184.

[2] Manu VIII. 69 ; Nar. IV. 167 ; Viṣ. VIII. 4 ; Bod. 1, 10, 31.

[3] Nar. IV. 167.

[4] Yaj. II. 7.

[5] ततोऽर्थी लेखयेत् सद्यः प्रतिज्ञातार्थसाधनम्।

[6] VIII. 74.

opinion. According to him "the evidence of a witness is of two kinds either of what has been seen or what has been heard."[1] According to Nārada "a *sākṣī* (witness) is so called from his directly knowing the occurrence with eyes or ears. The knowing with ears is of what others say and with eyes of what he actually sees himself."[2] Evidently the texts above quoted give a derivative meaning of the word *sākṣī*. A person is called *sākṣī* from the directness of his knowledge of the occurrence about which he is going to depose. That this was the accepted view is clear from a *sūtra* of Pāṇini as well—*sākṣāt draṣṭari samjñāyām* (the suffix *in* is added to the word *sākṣāt* and the word so formed means 'a direct observer').[3] Bodhāyana is more explicit and says, 'a witness should say what he has seen or heard.'[4] All these views taken together give us a rule which is not at all different from what we find in modern codes, namely, that when it refers to a thing which could be seen, it must be the evidence of a witness who says he actually saw it and when it refers to a thing which could be heard it must be the evidence of a witness who says he actually heard it.

So what our law-givers want to drive at is that evidence as a rule should in all cases be direct. Medhātithi rightly points out that the word *samakṣa* in Manu's text indicates that the evidence of a person in order to be admissible must be based on direct cognition of the facts of the case resulting from actual seeing or hearing[5] or in other words, it must be the evidence of what the witness knows himself and not of what he has heard from others and thus if a person has seen or heard a thing himself and if from him somebody else hears of it, then the

[1] VIII. 13.
[2] IV. 145.
[3] V. 2. 91.
[4] I. 10. 29.
[5] प्रमाणतत्त्व समक्षदर्शनं साक्षादनुभवनं···साक्षाददृष्टं चक्षुर्व्यापारेण वाक्पारुष्यं···शब्दप्रमाणम्।
—Medh. on Manu VIII. 74.

latter is not admissible as a witness on account of his knowledge on the subject being not direct.[1] So according to Medhātithi Manu's text enacts a general rule against the admission of hearsay evidently owing to its being derivative or second-hand evidence and consequently much inferior as compared with its original source. It is worth noting here that modern legislation also excludes hearsay evidence as far as possible exactly on similar grounds. The great commentator is further of opinion that as the root *dṛś* from which the word *darśana* is derived, denotes all kinds of perception the separate mention of *śravaṇa* is practically superfluous.[2] What he means to say is that *darśana* and *śravaṇa* connote one thing only, *viz.*, the correct mode of perception and as such any person having a right knowledge of the facts in dispute may be admitted as a witness, no matter whether this knowledge is based on actual seeing or hearing or on inference or on words of a person whose credibility cannot be questioned or on the authority of sacred scriptures.[3] This view seems to be supported by the Śukranīti which says that a person other than the parties who has only a true knowledge of the affair may be a witness.[4] Govindasvāmī also recognises that a man may be accepted as a witness when he possesses a knowledge of the matter in dispute though derived from such a means as *āptavākya*. This we know from his explanation of the expression *yathāśrutāni* occurring in Bodhāyana's text above referred to as *āptavākyādavagatāni*, *i.e.*, known from the words of a trustworthy person. Evidently an exception to the rule excluding second-hand evidence is intended when such evidence is derived from an unimpeachable authority. There are other exceptions too. Some authoritative texts declare that under some other circumstances

[1] यत् कुतश्चिदेकेन श्रूयते ततोऽन्येन तत् परम्परास्रुतं तेन परम्परास्रावी न साक्षी।
—Medh. on Manu VIII. 74.

[2] यद्यपि दृशिरुपलब्धिमात्रवचनस्तथापि—*Ibid.*

[3] किन्तु एतावद्यात विवक्षितं प्रमाणतो येनानुभूतं स साक्षी, समग्रदर्शनश्रवणयोश्च प्रमाणमात्रोपलक्षणार्थम् तेन—*Ibid.*

[4] IV. 5, 184.

also the secondary evidence of oral testimony may be admitted. These circumstances are created first by the death of the appointed witness and secondly by his going to a distant land which makes his presence in courts impossible and thus the production of primary evidence out of the party's power. We find it expressly mentioned in Nārada that indirect proof through a second-hand statement makes evidence just like direct proof when the appointed witness dies or goes abroad and speaks of the matter either in answer to questions of the plaintiff or of his own accord to other men.[1] Viṣṇu also says—'an appointed witness having died or gone abroad, those who have heard his depositions may give evidence.'[2] It may interest the reader to notice how far the Hindu law-makers anticipated the principles of modern legislation, according to which 'the statements, written or verbal, of a person who is dead or cannot be found are relevant facts in certain special cases' and further, 'the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states, when the witness is dead or cannot be found.'

Circumstantial Evidence.

'In the absence of witnesses (*i.e.*, direct evidence) the nature of hurt and other circumstances connected with the quarrel in question should be evidences.'[3] This is how Kauṭilya recognises the value of circumstantial evidence. He sees the importance of this class of evidence specially in cases of sudden and suspicious deaths both for determining if there has

[1] IV. 166 : यस्य मुमूर्षोर्विप्रवासी वा तदर्थं पृष्टस्यार्थिना उद्दिश्यश्रुतार्थस्य वा स्वयं विश्रावयतो वचनं श्रुतं यैश्च उत्तरसाक्षिणः प्रष्टव्याः ।—Asahāya. See the definition of the *uttara-sākṣī*.

[2] VIII. 12.

[3] व्यसनिके घातः कलहोपलिङ्गनं वा ।—Arthaśāstra, III. 19. 73.

been any foul play and for detecting the culprits.[1] According to him further a case of adultery may be established by such circumstances as the parties seizing one another by hair, any marks made on the body of the culprits, opinions of experts on consideration of circumstances or by statements of women involved in it.[2] It deserves to be noted here that Yājñavalkya also advocates the consideration of similar circumstances for the proof of a case of adultery.[3] Thus we see that even from the time of Kauṭilya and Yājñavalkya it has been realised that a fact can be proved either directly by witnesses who speak from their personal knowledge or that it can be inferred from other facts satisfactorily established. To put it in another way, evidence has been divided from a very early time into direct evidence and circumstantial evidence. We have already seen that Āpastamba recognises *liṅga* [4] which has been explained as inference drawn from circumstances as one of the independent means of proof, and thus the history of circumstantial evidence can be traced even to an earlier period.

Āpastamba's recognition of *liṅga* as an independent means of proof is important in another way too. It shows that direct evidence and circumstantial evidence were regarded as of equal force. We can get some additional information as to the value of circumstantial evidence from other authorities as well. Bṛhaspati says that a case in the absence of witnesses, direct or indirect, may be proved by means of *upadhā* which according to Vācaspati and the author of the Kalpataru means *yukti*[5] or a consideration of the surrounding circumstances.

[1] Arthaśāstra, IV. 7.

[2] केशाकेशिकं संग्रहणमुपलिङ्गनं वा शरीरोपभोगानां तज्जातेभ्यः स्त्रीवचनाद्वा ।—IV. 12.

[3] II. 283.

[4] II. 11. 29-6.

[5] असाक्षिके चिरकृते पृच्छेदुत्तरसाक्षिणः ।
शपथैर्वानुयुञ्जीत उपधां वा प्रयोजयेत् ॥

उपधा युक्तिरिति कल्पतरौ (Vīram., p. 224). उपधा युक्तिः (Vācaspati in the Vyavahāracintāmaṇi).

We have seen also that *anumāna* which means inference and is thus identical with Āpastamba's *liṅga* is recognised by Bṛhaspati as a means of proof, though of the worst kind.[1] It should also be noted here that according to Bṛhaspati when a decision is arrived at on the basis of this *anumāna pramāṇa*, it is to be technically termed *caritra*.[2] Thus it is evident that Bṛhaspati agrees with Āpastamba as regards the value of circumstantial evidence and gives it an importance equal to that of primary evidence so far as the efficacy of establishing a fact is concerned. It has been seen that Nārada also recommends the trial of some cases without the help of witnesses and on the strength of circumstantial evidences alone[3] and thus according to him as well circumstantial evidence and primary evidence stand on the same footing. Nārada's idea evidently is that when the evidences afforded by circumstances are quite sufficient to exclude every other hypothesis but the one under consideration, they should be deemed conclusive. According to these two writers, Nārada and Bṛhaspati, 'it is by circumstantial evidence or inference (*anumāna*) that the fact of partition also can be ascertained.'[4] In addition to the six cases mentioned by Nārada in which witnesses are not required, a text of Śaṅkha-Likhita mentions another case, namely that of the possession of stolen goods as a further manifest proof of crime.[5] Some other legal texts also declare that possession of stolen goods is a very good evidence of larceny.[6] The idea is that when a man is found in possession

[1] अनुमानाद वरः साक्षी।—Raghunandan, Vt., p. 49.

[2] अनुमानेन निर्णीतं चरित्रमिति कथ्यते।—Sc., p. 23.

[3] IV. 172-174.

[4] Hindu Law (Jolly), p. 165.

[5] लोप्तृहस्तयोः—Sc., p. 221.

[6] Manu, IX. 270. संसर्गेचिह्नलोप्तृंश्च विद्याता राजपूरुषैः। प्रदाप्यापहृतं शक्त्या दमैः शास्त्रप्रचोदितैः॥—Bṛhaspati (Vivādacintāmaṇi, p. 123).

of such properties or a part of them, it will naturally lead to the hypothesis that he is guilty of theft. Our law-givers were, however, not unaware of the dangers that might follow from an absolute reliance on the evidences furnished by circumstances not fully and properly investigated. They fully realised that 'there is a class of circumstances which from the apparent tangibility or reality of their nature may be preferred to beguile the judgment or enlist sympathies, but which, wanting the connecting link furnish in fact nothing but the phantoms of truth.' Thus Kauṭilya, Nārada and Bṛhaspati are all unanimous as regards the necessity of great caution being taken in the trial of a case, especially when it is a case of theft or assault and when it is supported by circumstantial evidence alone. Kauṭilya says, 'owing to one's accidental presence on the scene of theft or to one's accidental resemblance to the real thief in respect of his appearance, his dress, his weapons or possession of articles similar to those stolen or owing to one's presence near the stolen articles as in the case of Māṇḍavya, who under the fear of torture admitted himself to be the thief, one, though innocent, is often seized as a thief. Hence a man should be punished only after his guilt has been satisfactorily proved by thorough investigation.'[1] Nārada also mentions the case of Māṇḍavya, where justice was not done on account of the absence of proper investigation and consideration of circumstances.[2] The story of this great sage as related in the Mahābhārata[3] goes to show that he was put into trouble not because he admitted his guilt for fear of torture but because, he being true to his vow of silence, refrained from answering the questions put to him by the king's guards about the robbers who dropped their booty in his hermitage and were subsequently found there. Bṛhaspati agrees with Nārada in holding that the injustice

[1] ...तस्मात् समाप्तकरणं नियमयेत्—IV. 8.

[2] II. 42.

[3] Ādiparva, Ch. 116.

done in Māṇḍavya's case was merely a consequence of insufficient investigation of circumstances. He sums up the whole position thus : 'dishonest men may seem honest, and honest men dishonest, so the wrong notion may easily be created; therefore sentences should be passed after a proper consideration of the circumstances only ; the issue of a law-suit may convert a thief into an honest man, and an honourable man into an offender; Māṇḍavya acquired the reputation of a thief in consequence of a decision passed without a consideration of the circumstances of the case.'[1]

Bṛhaspati ends by saying :

केवलं शास्त्रमाश्रित्य न कर्तव्यो विनिर्णयः ।
युक्तिहीनविचारे तु धर्महानिः प्रजायते ॥[2]

'Decision should not be passed merely by following the letter of the law; if the circumstances are left out of consideration, violation of justice will be the result.' It must be understood that *śāstra* means here the law enunciated about a case from the point of view of a particular circumstance, and *yukti* a consideration of the totality of circumstances which such a case admits of. What happened in the case of Māṇḍavya is this : the law, that a man found with stolen goods is to be regarded as a thief, was followed to its very letter, while other circumstances which could very well explain matters and exculpate the great sage such as his observance of the vow of silence, his indifference towards worldly prosperity, his austerities, etc., were left uninvestigated and out of consideration. Hence the conclusion was false as a matter of consequence. The way in which Vaśiṣṭha refers to this rule, *viz.*, that a person found with the stolen goods is to be known as thief, goes to show that he also does not like to invest the evidence of the possession of stolen goods with any conclusive effect.[3]

[1] Viram., p. 18.
[2] VI. Cintāmaṇi, p. 59.
[3] XIX. 39.

The proper line of investigation in such a case has also been suggested by the authorities. According to Kauṭilya the defendant should be asked not only the nature of the work he did during the day previous to the theft but also the place where he spent the night till he was caught hold of.[1] Many other circumstances such as his association with rogues and thieves, possession of such instruments as are necessary for theft, identification of his foot-prints with those left near the house in which theft has occurred during ingress or egress or of the fragments of his garlands or dress with those thrown out in or near the house during entrance or exit, and many other similar circumstances should be taken into consideration before fixing the guilt upon him.[2] Nārada also, in maintaining that a man will be known as a thief not by the possession of stolen goods alone but by the surrounding circumstances speaking against him, goes on to say that proper investigation will consist in marking carefully his demeanour, noticing if he makes any impossible statement, eliciting answers from him with regard to the place, time and region of the occurrence, his name, his dwelling and his occupation in case he happens to be a workman and in seeing if he indulges in expenses for bad purposes, if he has been previously convicted and if he keeps bad company.[3]

Authorities, it seems, are equally emphatic upon the necessity of proper investigation being carried on in cases of assault not witnessed by anybody. Yājñavalkya says that in a case of assault where there is no witness, the decision should be arrived at by seeing the mark of assault, by a consideration of such circumstances as the motive of committing the assault, the proximity of the assailant and the assailed, etc., and from the

[1] ततः पूर्वस्याह्नः प्रचारं रात्रौ निवासञ्च 'आयइच्छादिति' अनुयुञ्जीत ।—IV. 8.

[2] IV. 6 (Arthaśāstra).

[3] Nār., Appendix. 8-11 (S.B.E., Vol. XXXIII, p. 224).

report of other people.[1] The text of Yājñavalkya further indicates that such an investigation is necessary in order to clear all doubts about the reality or otherwise of the mark of assault.[2] Nārada also expresses the same idea in a somewhat different language. The substance of what he says is that when a man is found with a mark of assault upon him and another man with an evident mark of committing the assault such as a sword smeared with blood, a tendency to connect these two facts becomes very strong; it should be remembered, however, that it is a matter of common occurrence that people in order to put their adversaries into trouble inflict wounds on their own bodies themselves and hence the right thing to do in a case like this is to make a thorough investigation which is to consist in ascertaining the cause and motive of the assault and the general capability of the offender for such an act.[3] It may be noted here that the judge made himself liable to a very heavy penalty if he failed to inquire into the necessary circumstances of a case.[4]

The circumstantial evidence was not only criminating but exculpatory too. Kauṭilya tells us that when a person is accused of theft he can be acquitted if he proves such circumstances as the complainant's enmity or hatred towards him.[5]

The main thing for us to note in this chapter is that circumstantial evidence was considered to be of so great a value as to be able to determine the fate of any suit, civil or criminal. We should note also that the law-givers realised that a conclusion deduced from circumstances was apt to be false and in very few cases it could amount to absolute certainty. This is why we find it enjoined that a very careful investigation should be

[1] II. 212.

[2] कूटचिह्नकृतो भयात्।

[3] IV. 176.

[4] दिशं दिशं न पृच्छति—Kau., IV. 9.

[5] चौरैश्चाभिशस्तो दैरदेयाभासपदिष्टकः शङ्कः स्यात्.—IV. 8.

made into all the circumstances of a case when there is no witness, and further that a great caution is to be taken regarding the value to be attached to such single facts as the possession of stolen goods or of deadly weapons. The Indian law-givers of the past seem not to have placed implicit faith in the maxim 'circumstances cannot lie, but men can.'

Number of Witnesses.

Gautama simply says, 'Witnesses should be many'[1] and does not fix any number. Consequently his expression 'many' (*bahu*) cannot be taken to mean anything but more than two, the maximum being unknown. But the meaning of this expression can be made clear in the light of other authorities quoted below. According to Manu the number should be at least three.[2] Yājñavalkya and Nārada are also of the same opinion.[3] Asahāya, commentator of Nārada, thinks that in a dispute regarding landed property more than three witnesses are required.[4] According to Bṛhaspati witnesses should be nine, seven, five, four or three in number; two even might do if they are *śrotriyas* but never one.[5] *Śrotriya* evidently means here a man of learning and virtuous disposition[6] and Devaṇabhaṭṭa thinks that the tribunal can act on the testimony of two of such persons only when they happen to be attesting or secret witnesses.[7] His opinion is based on another verse of Bṛhaspati which states that of attesting and secret witnesses there should be two of

[1] बहवः स्युः—XIII. 2.

[2] VIII. 60.

[3] Yaj. II. 70, Nār., IV. 153 (स्थावराः साक्षिणो ज्ञेयाः)

[4] अधिकास्तु भूवादे।

[5] नव सप्त पञ्च वा सुबलास्त्वय एव वा।
सभी तु श्रोत्रियौ यद्यौ नैकं पृच्छेत् कदाचन ॥—May., p. 21.

[6] श्रोत्रियाविति स्मृत्यन्तरोक्तयोत्कृष्टगुणावित्यर्थः।—Vācaspati in Cintāmaṇi.

[7] तत्रोभाविति लिखितगूढसाक्षिविषयम्—Sc., p. 174.

each sort; of spontaneous, reminded and family witnesses and of indirect witnesses, the number may be three, four or five according to circumstances.[1] Most of the law-givers are in agreement with each other on the question whether the testimony of a single witness is to be considered sufficient to prove or disprove a fact. Manu says 'a single man should not be made a witness.'[2] Kullūka thinks that the utility of this rule lies principally in avoiding the chance of justice being frustrated by the death or departure of that single witness.[3] Evidently according to Kullūka, Manu's rule refers to the case of an attesting witness. We shall see in the chapter on 'Document' that the number of attesting witnesses should at least be two according to Yājñavalkya and Vaśiṣṭha. In the opinion of Viṣṇu a person who happens to be a single witness for either of the parties is to be considered disqualified to give evidence.[4] Nārada says that such a witness should not be examined in court.[5] A text attributed by Jīmūtavāhana to Śaṅkha-Likhita is also very conclusive on the point. It declares that a single witness should be rejected under all circumstances.[6] It is interesting to note that the rule against the admissibility of a single witness was incidentally discussed in a case which was tried before a Hindu Court in the year 1794. Here the plaintiff proposed to call in his slave as his only witness. The defendant raised an objection to his admissibility on the ground of his singleness. The court allowed the objection on the authority of Śaṅkha and Bṛhaspati, and refused to examine that single witness.[7]

[1] Sc., p. 175.
[2] VIII. 66.
[3] नैको विनाशप्रवासमडबा—Kullūka on VIII. 66.
[4] VIII. 5.
[5] IV. 179.
[6] एकः साक्षी सर्वथा न याह्यः।—Vm., p. 318.
[7] Calcutta Weekly Notes, Vol. XXIV, No. 38.

The injunctions against the eligibility of a single witness must be taken, however, as mere statements of a general principle which is not without exceptions, for Yājñavalkya and Viṣṇu in agreement with each other concede that even one man might be allowed to depose if he was approved by both the parties (*ubhayānumata*), virtuous, not fraudulently inclined, and endowed with the qualities which a witness should possess.[1] Vijñāneśvara holds that the virtuous disposition of a person must be combined with the consent of both the parties in order that he may be allowed to be a single witness.[2] In this he has a follower in Jīmūtavāhana.[3] Vācaspati also follows him and says that the prohibition regarding the admissibility of a single witness is applicable only in the absence of the consent of the parties.[4] In this connection it is necessary for us to refer to the text of Manu which says that one man who is free from covetousness may be accepted as a witness.[5] Here no mention is made of the consent of the parties and hence it may lead to the inference that even in the absence of such a consent a single witness is admissible only if it is known that he is not covetous. Jīmūtavāhana notes it and says that the intention of Manu's text is not to ordain the admissibility of a single witness known to be free from covetousness without the consent of the parties but to exclude a covetous person from the category of witnesses even with such a consent.[6] The authors of the Vivādārṇavasetu and Vyavahārāloka do not quite agree with Vijñāneśvara and Jīmūtavāhana. The Vivādārṇava-setu points out that Viśvarūpa and some other earlier jurists have not insisted on the absolute necessity of a single witness

[1] Yāj. II. 72 ; Viṣ. VIII. 9.
[2] Mit. on Yāj. II. 72.
[3] Vm., p. 319.
[4] ...एतदोभयाननुमतविषयम् ।—(Vy. c. in manuscript.)
[5] VIII. 77.
[6] Vm., p. 319.

being possessed of virtuous disposition when he is approved by both the parties and holds that though a combination of the consent of the parties with the virtuous disposition of a single witness is of course a desideratum, yet when this is impossible to get, the consent of the parties alone will be sufficient to entitle him to be examined.[1] This view is supported by a text of Nārada which is as follows :

उभयानुमतो यः स्याद् द्वयोर्विवदमानयोः ।
असाक्षिकोऽपि साक्षित्वे प्रष्टव्यः स्यात् स संसदि ॥[2]

'By consent of the parties one man alone may be a witness. He though incompetent (on account of his singleness) should be examined as a witness.' There is no mention of virtuous disposition in this text and this shows that according to Nārada a single person without any consideration of his character may be called as a witness and examined with the common consent of the parties, or, to be more clear, a witness should not be rejected on the grounds of his singleness and the absence of virtuous disposition in him if both the parties agree to his being examined, but his evidence may not be accepted if it comes to light in the course of his examination that he has acted from fraudulent or avaricious motive. The idea evidently is that when a certain matter seems impossible to be decided on account of the paucity of pre-appointed evidence and when one of the parties suggests or the court thinks that by calling in a particular person as witness many new things calculated to help the decision may be brought to light, then that particular person may be examined with the consent of the opposite party or both the parties, as the case may be, and his evidence will be deemed conclusive provided it is not proved that he was impelled by a fraudulent or interested motive. It is further

[1] अतएव विश्वरूपप्रभृतीनाम् उभयानुमत एक एव साक्षीति व्याख्याने धर्मविदिति नोक्तम्···एकोऽभिमतगुणसम्पन्नः उभयानुमतः प्रधानकल्पः तदभावे उभयानुमतमात्रोऽपि याह्यः—Vi. setu, pp. 118, 119.

[2] IV. 192.

held by this treatise on the authority of a text of Vyāsa that the consent of the parties also in its turn is not essential for the examination of a single witness when he happens to be virtuous, of pure deeds and sincere.[1] The Vyavahārāloka actually divides the passage of Yājñavalkya **उभयानुमतः साक्षी भवत्येकोऽपि धर्मवित्**[2] into two parts, the first part being **उभयानुमतः एकोऽपि साक्षी भवेत्** and the second part **धर्मविदेकोऽपि साक्षी भवेत्**.[3] Evidently according to these treatises consent of the parties and the virtuous disposition of a person are separate and independent factors for his eligibility as a single witness. It must thus be understood that just as a person approved by both the parties, need not be absolutely honest, so one who is absolutely honest need not have the approval of the parties in order to be examined as a single witness.

In a verse of Kātyāyana we find mentioned two cases of casual nature in which, he says, deposition of a single witness is sufficient.[4] Jīmūtavāhana and Kamalākarabhaṭṭa hold that the consent of the parties is not necessary for the examination of such a witness.[5] Obviously according to them a casual witness to a fact, *i.e.*, a person who has accidentally witnessed it, though single, can give his testimony without even the consent of the parties. The two cases mentioned by Kātyāyana are those of *nikṣepa* and *yācita*. When a thing is openly

[1] उभयानुमतत्वाभावेऽपि शुचिक्रियत्वादिगुणयुक्त एको याह्यः शुचिक्रियश्च धर्मज्ञः...इत्यादि व्यासवचनात्
—Vi. setu, p. 119.

[2] Yāj. II. 72.

[3] उभयानुमतः साक्षी भवेदितिच्छेदः। अन्यथाधर्मवित्त्वस्य अदृष्टार्थकता स्यात्। धर्मविदेकोऽपि उभयानुमतोऽपीति युक्तिः।—Vyavahārāloka in manuscript.

[4] अभ्यन्तरस्यनिक्षेपे साक्ष्यमेकोऽपि वाच्यते।
अर्थिना प्रहितः साक्षी भवत्येकोऽपि याचिते ॥—Vm., p. 319, May, p. 22.

[5] न तत्रोभयानुमत्यपेक्षा कार्या—Vm., p. 319.
अनुमत्यभावेऽपि राज्ञा शिष्टो ज्ञात एकोऽपीत्याह व्यासः...गुरुरप्याह कात्यायनः अभ्यन्तरस्यनिक्षेपे...
—Vi. tan. in manuscript.

deposited with the head of a family on mere trust it constitutes *nikṣepa*.[1] The very nature of *nikṣepa* is that it is not required to be done in the presence of any witness. Now if at the time of returning the thing so deposited a dispute arises as to its quantity nobody can bear testimony to it. Supposing the affair was accidentally witnessed by one person only, there may arise the question 'Will he be debarred from deposing on the ground of his singleness?' Kātyāyana's text distinctly says 'he should not be.' Jīmūtavāhana and Kamalākara think that such a witness may be examined even without the consent of the parties and the case will be concluded only by his deposition, if it proves trustworthy.[2] Similarly clothes, ornaments and the like borrowed from another at the time of marriage or other festivals are called *yācita*. In a dispute regarding the quantity of such things also a single person who was sent to borrow the things, or who was accidentally present at the time of the borrowing and witnessed it will be allowed to give evidence without the consent of the parties and such evidence will be considered conclusive if it becomes sufficiently clear that he has not acted under any bias or interest.[3] In another verse Kātyāyana contemplates a third case also. Here he observes that in the case of an article made by an artisan being the object of litigation, the artisan who made it may be called, though single, as a witness to prove any particular regarding it, to identify it and so on.[4] Kauṭilya's rule is more definite

[1] Mit. on II. 67: यदस्वामिने परोक्षं दत्तं न्यासः, समक्षं दत्तं निक्षेपः;—Vi. tan. in manuscript.

[2] Vm., p. 319.

[3] Mit. on Yāj. II. 67.
Vm., p. 319.
May, p. 22.

[4] संकृतं येन यत् पण्यं तत्तेनैव विभावयेत् ।
एक एव प्रमाणं स्यात्..... ॥
(संकृतं निर्मितं पण्यं कुण्डलादिः)—Viram., p. 151 ; Vi. setu (in manuscript).

on the point. According to him in secret dealings where there is no possibility of having many witnesses, only a single witness, no matter whether such a witness be a male or a female, who has only overheard the parties or seen the occurrence unnoticed by others can be called in and examined.[1] The rules of Kātyāyana and Kauṭilya amply prove the fact that the question of the number and competence of witnesses was considered only in the case of pre-appointed and not casual evidence.

Opinions are divided as to whether a single witness can prove a case of *sāhasa*, *i.e.*, a heinous offence like manslaughter, robbery, adultery (or more properly, outraging the modesty of a woman), defamation and assault. Authorities are of opinion that in such cases the competency of witnesses should not be examined too strictly.[2] Nārada insists, however, that even then one witness would not do.[3] He evidently does not favour the idea of placing absolute reliance on the story of a single witness where condemnation would be followed by very serious punishment. Vyāsa seems to be quite against such a view. He thinks perhaps that by requiring a plurality of witnesses in cases of criminal assault, murder, robbery, etc., a premium would be paid to crime and dishonesty and thus lays down that even a single man known to be truthful, virtuous and of pure deeds, will be quite sufficient to prove any fact to which he speaks, especially in cases of this description.[4]

Bṛhaspati modifies his rule regarding the rejection of a single witness by making exceptions in favour of some special

[1] रहस्यव्यवहारेषु एका स्त्री पुरुष उपश्रोता उपद्रष्टा वा।—III. 11.

[2] Manu VIII. 72, Nār. IV. 188, 189. Viṣ. VIII. 7.
साहसात्ययिके चैव परीक्षा कुत्रचित् स्मृता (Kāt.) Sc., p. 183.

[3] IV. 190.

[4] यश्चिक्षियश्च धर्मज्ञः साक्षी यत्रानुभूतवाक्।
प्रमाणमेकोऽपि भवेत् साहसेषु विशेषतः॥—Vm., p. 319, Vīram., p. 150.

persons. He says that the king, the chief judge, each of the assessors, the court-scribe, the court-accountant, one who knows the innermost secrets of the parties (*kāryamadhyagata*) and the messenger (*dūtaka*) can separately be a single witness.[1] The Vyavahāramātṛkā comments that their testimony is receivable even without the consent of the parties.[2] When and under what circumstances they can depose has been fully discussed above. Devaṇabhaṭṭa maintains the position that without the consent of the parties no single witness can be examined and as such this consent is essential in the case of these persons also not excluding the king even.[3] The indefensibility of such a position is quite manifest.

Vijñāneśvara thinks that the consent of the parties is necessary even in the case of two witnesses.[4] Jīmūtavāhana is of opinion that when *śrotriyas* happen to be the two witnesses such a consent is not required.[5]

All these views taken together prove beyond doubt that the law-givers of the past did not lay down a universal rule regarding the number of witnesses which would be applicable to all causes. They thought indeed that it was dangerous to decide cases relying on the story of a single witness, but at the same time did not ignore the fact that the insistence on the calling in of a plurality of witnesses might create an obstacle to the administration of justice especially where the act to be proved was of a casual nature. Thus though they were in favour of exacting 'many witnesses,' they did not absolutely reject a single witness. On the other hand they laid down that the evidence of a single witness could establish any fact

[1] Vm., p. 319; May. p. 22; Sc., p. 175; Vīram. p. 150.

[2] न तयोभयानुमत्यपेक्षा कार्या...तथा च डइस्थतिः...p. 319.

[3] तदेतत् सर्वमुभयानुमतसाक्षिविषयम्—Sc., p. 175.

[4] एकस्य द्वयोर्वा उभयानुमत्यैव साक्षित्वं भवति इति—Mit. on Yāj. II. 72.

[5] उभौ तु श्रोत्रियाविति...तत्रानुमतिं विनापि—Vm., p. 318.

to which he spoke directly, if he was absolutely honest and trustworthy.

In exacting a plurality of witnesses the Hindu law does not stand isolated from all other systems, modern or ancient. 'The law of Mahomed demanded that a woman could only be convicted of adultery on the testimony of four male witnesses and his successor, the Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail and that the four male witnesses must have witnessed the very act in the strictest sense of the word. The law of Moses in certain criminal cases and the New Testament in certain ecclesiastical matters require two witnesses. Five witnesses were required by the imperial law to prove certain payments and the canon law occasionally required five, seven or more witnesses to make full proof.'[1]

The modern law of evidence also exacts a plurality of witnesses obviously with a view to guard against misdecision 'inasmuch as a false story runs great risk of being detected by discrepancies in their testimony especially if they are questioned skilfully and out of the hearing of each other.' The difference, however, between the modern system and the ancient Hindu law in this respect is not small. The Hindu code starts with the idea that plurality of witnesses is required as a general rule and the deposition of one witness is to be deemed sufficient only in exceptional cases. The modern system is just the reverse. It begins with the proposition that 'no particular number of instruments of evidence is necessary for proof or disproof—the testimony of a single witness is a sufficient basis for decision both in civil and criminal cases' and some exceptional matters only such as treason, perjury, breach of promise to marry, etc., are not provable by a single witness.

[1] Best on Evidence, pp. 57, 58.

Burden of Proof.

The general rules as to the burden of proof and consequent obligation of beginning are embodied in the following verses of Vyāsa, Nārada and Bṛhaspati :—

प्राङ्न्याये कारणोक्तौ तु प्रत्यर्थी साधयेत् क्रियाम् ।
मिथ्योत्तरे पूर्ववादी प्रतिपत्तौ न सा भवेत् ॥[1] (Vyāsa).

अभियुक्तोऽभियोगस्य यदि कुर्यादपह्नवम् ।
अभियोक्ता दिशेद्देश्यं प्रत्यवस्कन्दितो न चेत् ॥[2] (Nārada).

प्रतिज्ञा भावयेद् वादी प्रत्यर्थी कारणन्तथा ।
प्राग्वृत्तादिविजयं जयपत्रेण भावयेत् ॥[3] (Bṛhaspati).

प्राङ्न्याये प्रत्यवस्कन्दने प्रत्यर्थी साधयेत् स्वयम् ।
उत्तरार्थं प्रतिज्ञार्थमर्थी मिथ्योत्तरे पुनः ॥[4] (Bṛhaspati).

These verses tell us in the first instance that when the defendant admits the charge or claim, there is no issue to be proved and consequently adducement of evidence will not be at all necessary. When, however, the defendant submits a *mithyottara, i e.*, takes a plea in which he totally denies the allegation made against him, then the burden of proof is on the plaintiff.[5] This point is fully elaborated by the Mitākṣarā from which the following lines are quoted for ready reference :

अर्थी नाम साध्यस्यार्थस्य निर्देष्टा । तत्प्रतिपक्षस्तदभाववादी प्रत्यर्थी । तत्राभावस्य भावसिद्धिसापेक्षसिद्धित्वाद् भावस्य चाभावनिरपेक्षसिद्धित्वाद् भावस्यैव

[1] Vīram., p. 92 ; Vīram. attributes this verse to Hārīta, p. 308.
[2] Nār. II. 26 ; Bālam., p. 66 ; Vy. c.
[3] Vm., p. 309, Vīram., p. 93.
[4] Sc., p. 119.
[5] अभियुक्तोऽभियोगस्य यदि कुर्यादपह्नवम् ।
मिथ्या तत्र विजानीयादुत्तरं व्यवहारतः ॥—Kāt. in Mit. on Yāj. II, 7.
अयं मह्यं धारयतीत्युक्ते नाहं धारयामीति ।
मिथ्योत्तरे पूर्ववादी साध्यवान् । कारणप्राङ्न्याययोस्तु उत्तरवाद्येव साध्यवान् यस्य साध्यवत्ता तस्यैव साधनोपन्यासः ।—Bālam., p. 67.

साध्यत्वं युक्तम्। अभावस्य स्वरूपेण साक्ष्यादिप्रमेयत्वाभावात्। अतस्तार्थिन एव क्रिया युक्ता।[1]

"An *arthī* is one who alleges the fact to be established. The adverse party denying the allegation is *pratyarthī*. The issue is to be proved by the *arthī* because he states an affirmative and not by the *pratyarthī* simply on the ground that he states a negative. The proof of a negative depends upon the presupposition of its corresponding affirmative and that of an affirmative does not require its corresponding negative to be proved as existing. Witnesses and other means of proof cannot establish a negative and thus a negative is incapable of proof. Therefore the *arthī* (one who states an affirmative) is the party on whom the burden of proof should lie." We know further from the verses quoted above that when the plaintiff's party is worsted through the submission of a *prāṅnyāya* reply by the defendant, that is to say, when he takes the plea of *res judicata* saying that the plaintiff brought against him the same case and was defeated in a former trial;[2] or through the submission of *a kāraṇa* or *pratyavaskandana* reply, *i.e.*, when instead of denying the allegation against him the defendant admits the charge (such as of taking the loan in question) but contends that there are some additional facts (such as of paying off the loan) for which the plaintiff is not entitled to the relief he seeks,[3] or, in other words, 'relies on

[1] Mit. on Yāj. II. 80.

[2] आचारिणावसन्नोऽपि पुनर्लेखयते यदि।
सोऽभिधेयो जितः पूर्वं प्राङ्न्यायस्तु स उच्यते॥
यत्राभियुक्त एवं ब्रूयादस्मिन्नर्थे अनेनाहमभियुक्तस्तत्र चा' व्यवहारमार्गेण पराजित इति॥
—Mit. on Yāj. II. 7.

अस्मिन्नर्थे समानेन वादः पूर्वमभूत्सदा।
जितोऽयमिति चेद् ब्रूयात् प्राङ्न्यायं व्यासदुत्तरम्॥—Sc., p. 48.

[3] अर्थिना लेखितो योऽर्थः प्रत्यर्थी यदि तं तथा
प्रपद्य कारणं ब्रूयात् प्रत्यवस्कन्दनं श्रुतम्॥
प्रत्यवस्कन्दनं नाम सत्यं गृहीतं प्रतिदत्तं प्रतिगृहीतं वेत्यमिति वा।—Mit. on Yāj. II. 7.

party from whom the plaint has come first' but 'the party who claims the first gift and occupancy.'[1] Parāśara Dharmasaṁhitā also supports this view and illustrates it in the following manner:[2] "Suppose a man receives as a gift a certain piece of land, enjoys it for some time and then goes with his family to a distant country. Then that piece of land enjoyed by him is taken possession of by some other man. He too after some time goes to another land for some troubles in his own country. Both of them return after a long time to their respective places and go to the court in order to get the dispute regarding the land formerly enjoyed by them settled. One of them says, 'King Jayavarma at the time of his rule had made a gift of this land unto me.' The other also says, 'King Dharmapāla gave this land to me.' Both of them have witnesses. Under such circumstances the witnesses of that person have to be examined who states that the gift of the land was made to him first, on account of his mentioning the fact that it primarily belonged to him and not the witnesses of the adverse party, because they are witnesses to the gift made at a subsequent occasion and as such are as good as no witnesses."[3] The Mitākṣarā in explanation of the second part of Yājñavalkya's text further says that when the claim of the *pūrvavādī* becomes *adharībhūta*, that is to say, when he becomes weak (or rather ineligible to offer evidence) owing to the submission of the rival claimant to the effect that title did really lie with the *pūrvavādī* but that it had been subsequently transferred to him (the rival claimant) through some act on the part of the *pūrvavādī* himself, then he (the rival claimant) who asserts this special circumstance and speaks by the subsequent title will have to begin and adduce

[1] पूर्वस्मिन् काले मया प्रतिग्रहीतमुपभुक्तं चेति यो वदत्यसौ पूर्ववादी। न पुनर्यः पूर्वं निवेदयति तस्य साक्षिणः प्रष्टव्याः।—Mit. on Yāj. II. 17.

[2] Pds., pp. 117-18.

[3] नेतरस्य साक्षिणः। तेषामुत्तरकालदानसाक्षित्वेनासाक्षिप्रायत्वात्।—Pds., p. 118.

the evidences necessary to prove his contention.[1] Thus when the rival claimant says, for instance, that it is true that the land in question formerly belonged to his adversary but that it is also equally true that the latter had sold it to the king who in his turn gave it to him (the rival claimant) or that he had received it as a gift from another to whom it had been given by his adversary, then the witnesses of the former who claims the second acquisition and occupancy are to be examined.

Saṅkarottara.

The singular number used in the word *uttara* in the injunction **श्रुतार्थस्योत्तरं पूर्वावेदकसन्निधौ लेख्यं**[2] indicates, the Mitākṣarā and the Vivādatāṇḍava contend, that the confusion of pleas (*uttarāṇām saṅkaraḥ*) is inadmissible.[3] As to what constitutes 'confusion of pleas' Kātyāyana is our best authority. His text on the subject is quoted below :

पत्तैकदेशे यत् सत्यमेकदेशे च कारणम् ।
मिथ्या चैवैकदेशे च सङ्करात्तदनुत्तरम् ॥[4]

According to the Mitākṣarā the meaning of this text is that when an answer *confesses to a part, specially excepts to some other part* and *denies to quite another part*, it is not a proper answer on account of confusion. It is to be noted that the mention of the plea of former judgment (*prāṅnyāya*) has been omitted from this text for no special reason and this plea also combined with one or more other pleas will constitute *saṅkara*.

[1] यदा त्वन्य एवं वदति सत्यमनेन पूर्वं प्रतिगृहीतमुपभुक्तं च किन्तु राज्ञेदं चैवमस्मादेव क्रयेण लब्धा नष्टं दत्तमिति अनेन वा प्रतिग्रहेण लब्धा नष्टं दत्तमिति तव पूर्वपक्षोऽसाध्यतया अधरीभूतस्तस्मिन् पूर्वपक्षेऽधरीभूते उत्तरकालं प्रतिगृहीतमुपभुक्तं चेतिवादिनः साक्षिणः प्रष्टव्या भवन्ति ।
—Mit. on Yāj. II. 17.

[2] Yāj. II. 7.

[3] उत्तरमित्येकवचननिर्देशादुत्तराणां सङ्करो निरस्तः ।—Mit. on Yāj. II. 7.
उत्तरं लेख्यमित्येकत्वादुत्तराणां सङ्करो निरस्तः ।—Vi. tāṇ. (in manuscript).

[4] Pds., p. 77 ; Mit. on Yāj. II. 7 ; Vy. c. (in manuscript).

Saṅkarottara (confusion of pleas), as the Mitākṣarā understands it, may be illustrated by a few examples. In an action for the recovery of one hundred rupees if the defendant in his answer admits the claim in respect of fifty rupees, pleads an acquittance in respect of twenty-five rupees and denies having borrowed at all the rest of the sum, his answer will distinctly involve three pleas—in one part *satya*, in one part *kāraṇa* and in another part *mithyā*. Proof will not be required as regards the first plea because it is *sampratipatti* (confession), the burden of proof as to the second would be upon the defendant and as to the third it would be upon the complainant. So also in a suit for the recovery of one hundred *suvarṇas*, one hundred rupees and some pieces of cloth, if the defendant denies the first claim, pleads an acquittance as to the second and former judgment as to the third his answer will involve three pleas—*mithyā*, *kāraṇa* and *prāṅnyāya*. The burden of proof regarding the first would be upon the complainant and as to the second and third it would be upon the defendant. In like manner in an action for debt of one hundred *suvarṇas* and one hundred rupees if the defendant denies the first charge and pleads an acquittance as to the second, his answer will involve two pleas only and the burden of proof regarding the first would be upon the complainant and the second on the defendant. An answer involving four pleas may also be similarly illustrated.[1]

As to the reason why an answer involving more than one plea cannot be regarded as a true answer, we must look to another text of Kātyāyana[2] which declares that in one and the same suit the burden of proof cannot rest on both the parties, neither can both obtain judgment, nor can the burden of proof

[1] Mit. on Yāj. II. 7 ; Vy. c. (in manuscript) ; Pds., pp. 77 and 78.

[2] न चैकस्मिन् विवादे तु क्रिया स्याद वादिनोर्द्वयोः ।
न चार्थसिद्धिरुभयोर्न चैकस्य क्रियाद्वयम् ॥
—Sc., p. 102.

regarding two pleas rest on the same party. The effect of submitting an improper answer is not also insignificant—it may ultimately lead to the total defeat of the defendant.[1] It is true that when there are several counts, they cannot be answered without their respective pleas. Vijñāneśvara realises it and in his opinion Kātyāyana's text should be interpreted as prohibiting the urging of the pleas all at the same time and not in succession.[2] For, Kātyāyana's text distinctly says that an answer which involves more than one plea is improper on account of confusion (*saṅkarāttadanuttaram*). So if this confusion may be avoided by bringing forward the pleas one by one there will be nothing to say against the answer involving them. The Vivādatāṇḍava follows the Mitākṣarā in this interpretation of Kātyāyana's text and makes the point more clear by saying that several pleas are inadmissible only if there is one law-suit, but if it be considered that there are as many law-suits as there are pleas and if they be separately taken there will be no confusion.[3] Devaṇabhaṭṭa also supports the interpretation given by the Mitākṣarā. He says that when the nature of the plaint demands an answer which would involve more than one plea, then the plaint should be divided into several parts and each of these parts should be taken up separately and the answer of the defendant should be confined solely to it.[4] The idea evidently is that if the defendant prefers

[1] पूर्वपक्षे यथार्थं तु न ददादुत्तरं यदा ।
प्रत्यर्थी दापनीयः स्यात् सामादिभिरुपक्रमैः ॥

यथार्थमुत्तरं दद्यात्.....

उपायैश्चोद्यमानस्तु न ददात्युत्तरं यदा ।

अतिक्रान्ते समरावे जितोऽसौ दातुमर्हति ॥—Sc., pp. 104-05.

[2] एतेषां चानुत्तरत्वं यौगपद्येन तस्य तस्यांशस्य तेन तेन विनाभिहेः । क्रमेणोत्तरत्वमेव ।
—Mit. on Yāj. II. 7.

[3] तदेकवादे विरुद्धं किन्तु विवादभेदेऽस्यैवैयर्थ्यः—Vi. tāṇ. (in manuscript).

[4] क्रमेणैकैकप्रतिज्ञाया एकैकमुत्तरं वाच्यम्.....उक्तविधया सदरे निराकृते स्यादेवोत्तरत्वमित्यभिप्रायः ।
—Sc., p. 103.

to take several pleas in respect of the charges made each of them should be separately considered and its nature will determine on whom the burden of proof will lie, but in no instance should the two adverse parties be allowed to plead at the same time in the same case. Vācaspatimiśra and Misarumiśra do not accept this interpretation of Yājñavalkya's text. Their idea of *saṅkarottara* (confusion of pleas) is quite different. According to them the example of *saṅkarottara* should be 'I have not borrowed the hundred rupees in question, if I borrowed I have already paid off the sum; no, this sum is still due,' etc. Or, in other words, in the opinion of these digest-makers, confusion occurring in respect of one and the same part will constitute *saṅkara*.[1] Thus Vācaspatimiśra says that the repetition of the expression *ekadeśa* for the second and third time in Kātyāyana's text is meaningless and two or more pleas in order to constitute *saṅkarottara* should relate to one and the same part of the charge.[2] When, however, the *avacchedas* (parts) are different, the pleas taken severally in respect of them will not constitute *saṅkara* and as such objection should not be taken to an answer involving them.[3] It should be noted that commentators differ after all in the conception of the confusion of pleas only. There is no disagreement, however, regarding the rule that when owing to the combination of two or more pleas taken by the defendant to the different allegations of the plaintiff in a complicated controversy there arise several issues, the plaintiff has to prove that issue only which is upon him and the defendant has to prove the issues upon which he intends to rely.

[1] तस्मादेकदेशे यदुत्तरं संकीर्यते तदनुत्तरम्। तथा हि मया शतं न गृहीतं गृहीतं वा परिशोधितं धारयाम्येवेत्यादि—Vy. c. (in manuscript).

शतरूपमेकस्मिन् विषये मिथ्यादित्वस्य—Vivādacandra (in manuscript).

[2] शेषमेकदेशपदद्वयं चानुवादः—Vy. c. (in manuscript).

[3] यत्तु भिन्नभिन्नावच्छेदेन कारणादिस्यशिं तत् सदुत्तरमेव। अवच्छेदभेदेन साङ्कर्यस्यैवाभावात्।

—Vy. c. (in manuscript).

The order in which the several issue are to be taken up is to be determined mainly by a consideration of their importance. The relative importance of the pleas taken to various charges in a law-suit may be judged from two things—from a consideration of the monetary value of the claims regarding which these pleas are taken or from their capability of being established by conclusive evidence. Thus Hārīta says, 'if it be asked which of the pleas is to be taken up when there is a combination of total denial (*mithyottara*) and a special plea (*kāraṇottara*) or of confession with another plea, the reply is that the plea relating to the part involving the largest monetary value or the one capable of being substantiated by conclusive proofs such as possession, documents, etc., is to be taken as a distinct answer, otherwise confusion cannot be avoided.'[1] Thus in an action for the recovery of one hundred rupees if the defendant answers, 'the sum of fifty rupees has been already paid off, the sum of twenty-five rupees is still due and the rest I have not borrowed from the plaintiff at all,' it is evident that the most important plea brought forward is the plea of special exception (*kāraṇottara*) inasmuch as it concerns the biggest part of the amount and as such it will have to be taken up first and the burden of proof in respect of it will be on the defendant. The case will then proceed with the plea of total denial in respect of twenty-five rupees and regarding this part the burden of proof will fall on the complainant. But in an action to recover one hundred *suvarṇas*, one hundred rupees and some pieces of cloth, if the defendant admits the first claim, denies the second and pleads acquittance in respect of the third, the case will not begin with the first claim, though it involves the largest amount

[1] मिथ्योत्तरं कारणञ्च स्वातमिकञ्च चेद्भवेत् ।
सत्यं वापि सहान्येन तत्र यात्तं किमुत्तरम् ॥
यत् प्रभूतार्थविषयं यच्च वा स्यात् क्रियाफलम् ।
उत्तरं तत्र तज्ज्ञेयमसङ्कीर्णमतोऽन्यथा ॥—Mit. on Yāj. II. 7 ; Sc., p. 103.

The clause यच्च वा स्यात् क्रियाफलम् is not correctly explained by Vi. setu, p. 109.

among all the claims, because confession is made in respect of it and as such it admits of no proof.[1] The plea of total denial involving greater monetary value than the other plea does will be taken up first and substantiated by the complainant, and then the third plea regarding the pieces of cloth will follow and the burden of proof will be on the defendant. When distinction cannot be made between one plea and another in point of importance then the order in which various pleas are to be considered is to be regulated by the inclination of the parties and of the tribunal.[2]

When two pleas apply to one and the same charge, the rule as to on whom the burden of proof will lie becomes a little different. If *mithyottara* (plea of total denial) and the *prāṁnyāyottara* (plea of *res judicata*) combine, the latter will absorb the former and the burden of proof will be wholly on the defendant. Thus in a charge of one hundred rupees if the defendant replies, ' No, I did not take the money, the plaintiff has also been defeated in a former trial about it,' the burden of proof will wholly be upon the defendant inspite of the fact that *mithyottara* (plea of denial) which demands adducement of proof by the plaintiff is a part of the whole answer. It should be noted here that *mithyā* or denial as regards the truth of the charge, as a rule, is implied in *prāṁnyāyottara* (plea of former judgment) and as such is not given a separate consideration when both of them apply to one and the same charge. *Mithyottara* is to be regarded as merged in *kāraṇottara* also in case there is a junction of the two regarding the whole matter charged. A text attributed to both Hārīta and Vyāsa distinctly says that *kāraṇottara* is to prevail over *mithyottara* when they apply to one and the same count and as such the proof rests

[1] Mit. on Yāj. II. 7.

[2] क्रमस्थार्थिन: प्रत्यर्थिन: सभ्यानां चेच्छया भवति।—Mit. on Yāj. II. 7.

यत्र पुन: सदृशोत्तरे तुल्यबलतया न पूर्वोक्तक्रमे हेतुरस्ति तत्रापीच्छिक्रमेणोत्तरं याह्यम्।

—Sc., p. 104.

with the defendant.[1] The following imaginary case is cited as an illustration of the blending of these two answers. Suppose a person arraigns another alleging that he had lost at a certain time a certain cow belonging to him which had subsequently been found in the house of the other and the defendant asserts that the allegation is false and that the cow was in his house previously to the period mentioned by the plaintiff or that it had been born in his (defendant's) house. It becomes indeed difficult in the absence of such a rule to ascertain as to who is to adduce proofs in such a case. For it is evident that it is not a simple denial because of its involving a justification. Nor is it a special plea because in a special plea there is a partial admission of the allegation. In reality it is an instance of exculpatory negation (*sakāraṇa mithyā*)[2] and the rule just referred to prescribes that in the case of such a plea taken the burden of proof is on the defendant. It cannot be maintained that in such a case the burden of proof may as well be on the plaintiff on the ground that the plea taken involves denial also, for, the rule that the burden of proof is on the plaintiff when there is *mithyottara* (denial) relates to cases of simple denial. On the analogy of this it cannot be urged that the burden of proof is on the defendant only when the special plea taken is also simple, because, as the Mitākṣarā points out, there cannot be any such thing as simple special plea, for special plea will always involve denial of the truth of the charge.[3]

When the plea of former judgment and special plea combine in respect of one and the same charge the burden of proof as regards both the pleas is on the defendant and the defendant in that case may use his option as to which of these pleas he should take up first to substantiate. Thus in a suit for the recovery of one hundred rupees if the defendant replies that it

[1] Mit. on Yāj. II. 7.

[2] नापि मिथ्यैव कारणोपन्यासात्। नापि कारणमेकदेशस्याप्यभ्युपगमाभावात्। तस्मात् सकारण-मिथ्योत्तरमिदम्।—Mit. on Yāj. II. 7.

[3] Mit. on Yāj. II. 7.

is true that he took the sum from the complainant but it is also equally true that he has already paid off the sum and that the complainant has been defeated in a former trial about it, the defendant is at liberty as to which of these issues raised he will first prove.[1] It should be noted after all that though the Mitākṣarā contends that in such an answer there are two pleas combined, there is practically one plea which is predominant and that is the plea of former judgment. The other plea, *i.e.*, the plea of re-delivery, is subordinate to it and the defendant, if he can substantiate the former one, will win.[2]

The broad principle that the burden of proof lies on the party who asserts the affirmative of the issue and that a negative is incapable of proof, or in other words, that a witness cannot testify a negative, is recognised in modern jurisprudence as well on the ground that 'words are but the expressions of facts and therefore when nothing is said to be done, nothing can be said to be proved.' We have just seen that according to the Hindu law when the plea is *sakāraṇa-mithyā*, *i.e* , when the denial ceases to be a simple one on account of its qualifying circumstances, the burden of proof is shifted on the party who denies the assertion. It is interesting to note that the modern law also adopts exactly an identical principle.

Competency and Incompetency of Witnesses.

Persons qualified to be Witnesses.

1. Persons trusted by the king[3] and those who are trustworthy in general,[4] *i.e.*, those who are known to state facts as they are actually seen or heard and thus on whose veracity reliance can be placed.[5]
2. Those who have a love for truth.[6]

[1] Mit. on Yāj. II. 7.

[2] प्राङ्न्यायेन सह न कस्यापि साङ्कर्यम् ।—Vi. setu, p. 109.

[3] Gau. XIII. 2. [4] Manu. VIII. 63. [5] आप्ता अविसंवादकायेदृष्टार्थवादिनः येषां लोको विप्रलम्भकत्वं न सम्भावयति (Medh). [6] Vis. VIII. 8 ; Yāj. II. 69 ; Vas. XVI.

3. Persons free from greed.[1]
4. Persons simple by nature.[2]
5. Persons of virtuous conduct.[3]
6. Those who are charitably disposed.[4]
7. Men of substance.[5]
8. Those who are learned in the Vedic lore.[6]
9. Sacrificers (those who perform sacrifices according to the injunctions of the Veda).[7]
10. *Śrotriyas* (reciters of hymns).[8]
11. Students.[9]
12. Those who are zealous in the practice of religious austerities.[10]
13. Those who know their religious duties and are engaged in their performance, *i.e.*, those who are punctual in the performance of rites enjoined in the *Veda* and in the *Smṛti*.[11]
14. Those of holy deeds.[12]
15. Persons having families.[13]
16. Persons having sons.[14]
17. The natives of a place (indigenous inhabitants of the country as Bühler puts it).[15]
18. Those born in high families.[16]
19. Those who are sufficiently grown up (*vṛddha* but not *ativṛddha* or extremely old men).[17]
20. Persons of gentlemanly appearance, *i.e.*, of unblemished form (*rūpavān*).[18]
21. Persons free from partiality or malice.[19]

The object of a trial in every case is 'to ascertain the truth in respect of the charge made,' and it is evident that

[1] Manu. VIII. 63. [2] Yāj. II. 59 ; Nār. IV. 153. [3] Vas. XVI. [4] Yāj. II. 69. [5] Yāj. II. 69 ; Viṣ. VIII. 8. [6] Viṣ. VIII. 8. [7] Viṣ. VIII. 8 ; Yāj. II. 69. [8] Vas. XVI. [9] Viṣ. VIII. 8. [10] Viṣ. VIII. 8 ; Nār. IV. 153 ; Yāj. II. 69 ; Vas. XVI. [11] Manu. VIII. 63 ; Viṣ. VIII. 8 ; Yāj. II. 69, सर्वधर्मविदः धर्मानुष्ठानपराः ये ज्ञातारः सर्वधर्मज्ञा यदाचरन्ति श्रौतं स्मार्तम्...(Medh). [12] Vas. XVI. [13] Manu. VIII. 62. [14] Manu. VIII. 62. [15] Manu. VIII. 62. [16] Vis. VIII. 8 ; Yāj. II. 69 ; Nār. IV. 153. [17] Viṣ. VIII. 8. [18] Vas. XVI. [19] Gau. XIII. 2.

trustworthy witnesses alone can render the greatest help in this direction. Thus the main thing to be seen in connection with the eligibility of a person to be a witness is whether he is truthful and sufficiently strong to resist all temptations. It will be seen from the above list that our law-givers of the past fully realised this and they did not satisfy themselves by saying only that a person should be known as speaking the truth and free from greed in order to be admitted as a witness but were shrewd enough to name the person or class of persons who might possess those qualities either naturally or through consideration of future interest. Thus those who are simple and of good nature may be expected to be naturally truthful. Those who are known for their charity and riches are not likely to speak falsehood for small gains and the learned can easily resist temptations. Sacrificers and *śrotriyas*, though they are householders, care not much for worldly prosperity, and students by nature are straightforward and truthful. Those who are religiously disposed and act up to the injunctions of the Veda and *Smṛti*, naturally know everything as to what leads to heaven and what to hell. Such people perceiving that the telling of lies will lead to hell are afraid of untruth.[1] Those having families and sons, though they may have no special love for truth, are less likely to give false evidence at least for the love they bear to their hearths and homes. They might be indifferent in regard to consequences to themselves or might personally run away or keep themselves in hiding after telling an untruth in courts, but their sons, wives and relations might be molested by the king.[2]

[1] ये...नरकः फलमिह स्वर्गः इत्येवं निरवद्यैर्धनैर्जानन्ति ते ऋतताभिधाने नरकं पश्यन्तो बिभ्यति।
—Medh. on Manu. VIII. 63.

[2] ते हि कृतपरिकरपुत्रभयान्नान्यथा वदन्ति—Kul. on Manu. VIII. 62.

ते हि स्वकलत्रपरिभवभयान्न कूटमाचरन्ति। कुटुम्बिनः स्वकुटुम्बभयात् क्व आत्मानं परिरक्षिष्याम इति ज्ञात्वा कुटुम्बस्य सपीडतया राजदण्डभयान्नान्यथा प्रवर्तन्ते पुत्रिणः पुत्रस्नेहात्।
—Medh. on Manu. VIII. 62.

Perhaps the absence of this consideration in a *pravrajita* was responsible for the enactment of the rule against his admissibility as a witness.[1] The natives of a place are naturally afraid of falsely testifying against each other for fear of enmity and quarrels.[2] People born in a high family have the reputation of their family constantly in mind and thus they are not likely to bring disgrace on it by speaking falsehood in courts. Persons of immature consideration may do a thing indiscriminately and thus witnesses have to be persons fairly grown up. Outward appearance is generally an index of inward nature and thus those possessing gentlemanly appearance are possibly the possessors of merits as well. This consideration most probably weighed with Vasiṣṭha in whose opinion a witness should be a person of elegant looks (*rūpavān*). Above all, witnesses are to be impartial in all respects, and Gautama rightly points out that freedom from partiality for and malice against either of the parties is a great thing to be considered in connection with the eligibility of a witness.

Not only this. Our law-givers think also that witnesses are to come from the caste and class of the party by whom they are appointed. It is laid down by Manu that under ordinary circumstances women should be witnesses for women and for twice-born men twice-born men of the same kind (*dvijānāṁ sadṛśāḥ dvijāḥ*), virtuous *śūdras* for *śūdras* and men of the lowest caste for the lowest.[3] In Vasiṣṭha Saṁhitā also we meet with an identical injunction.[4] Kullūka and Nandana explain the word *sadṛśa* as *sajātīya*, *i.e.*, of the same caste, Govindarāja explains it as 'of the same caste and equally virtuous.' According to Medhātithi the word *sadṛśa* means here 'of the

[1] Yāj. II. 71 ; Nār. IV. 179.

[2] देशवासिना विरोधाच—Kull. on Manu. VIII. 62.

[3] VIII. 68.

[4] Vas. XVI.

same caste, occupation, learning, character, etc.'[1] Yājñavalkya says, 'the witnesses should be of the same class (*yathājāti*) and of the same caste (*yathāvarṇa*).[2] The word *jāti* has been used, according to the Mitākṣarā in reference to the various sub-classes and *varṇa* to the four main castes.[3] In the opinion of of Nārada, Brāhmaṇas, Kṣatriyas, Vaiśyas and Śūdras should be witnesses for people of the same caste under normal circumstances.[4] But that according to him also equality of class or rank is to be taken into consideration in the matter of selecting witnesses is evident from his statement that a member of a corporate body should act as a witness for a similar member, a member of an association shall be a witness among other members, an alien for an alien and women for women.[5] The four words used by Nārada in this connection are *śreṇī*, *varga*, *bahirvāsī*, and *strī*, appertaining to rank, status and sex all implied in *jāti* in addition to its accepted meaning of caste and Devaṇabhaṭṭa rightly comments that the word *jāti* has been used by Yājñavalkya with a view to signify *śreṇī*, *varga*, etc., as well.[6] The rule that the witnesses should be of the same caste and status with the parties for whom they are to depose is not to be taken, however, as absolute and this is clear from the following authoritative pronouncements of Yājñavalkya, Nārada and Vasiṣṭha ; (1) *sarve sarveṣu vā smṛtāḥ* (or all of them may be witnesses for all),[7] and (2) *sākṣiṇaḥ sarva eva vā* (or, all can act as witnesses).[8] According to the Mitākṣarā this relaxation of the rule is allowed only when witnesses of the same caste and rank are not available.[9] If we take *ślokas*

[1] सादृश्यं ज्ञात्वा शिल्पादिना वा गुणेन क्रियया च श्रुताध्ययनादिकया समानशीलतया।
—Medh. on Manu VIII. 68.

[2] Yāj. II. 70.

[3] ज्ञातयो मूर्धावसिक्तादयः वर्णा ब्राह्मणादयः—Mit. on Yāj. II. 70.

[4] Nār. IV. 154.

[5] Nār. IV. 155.

[6] ज्ञातिग्रहणं श्रेण्यादेरप्युपलक्षणार्थम्—Sc., p. 176.

[7] Yāj. II. 70, Nār. IV. 154.

[8] Vas. XVI.

[9] सजाति सवर्णासम्भवे—Mit. on Yāj. II. 70.

59 and 70 (Chap. VIII) of Manu together and consider the interpretation put on them by Kullūka, it will be seen that the above modification of the general rule was to be allowed not in civil cases but in urgent criminal suits only.

It is thus clear that our law-givers were over-cautious in the matter of selecting competent witnesses. This naturally resulted in the repudiation as witnesses of several persons. We shall presently see that they actually declared a large number of persons incompetent to serve as witnesses. The persons excluded were not only those who were positively known to be persons of bad character capable of disregarding truth but also those whose testimony had the remotest chance of being untrustworthy on account of their station, occupation, habits, status in society or some other known circumstances and visible causes such as personal interest or bias, want or deficiency of intellect, disease of body or of mind, etc. There was another consideration too underlying the principle of exclusion. It is a known fact that in consequence of peculiar position and functions of certain persons their services cannot be procured without causing a serious dislocation of their duties, religious, political or otherwise. Such persons are naturally to be excluded from performing all kinds of civic duties. The Hindu law also could not do away with such considerations and naturally excluded certain religious people and the king. Thus we shall see that the exclusionary rules in early days were based upon an intention to guard against any misrepresentation of facts by securing witnesses of unimpeachable reliability as well as on the ground of privilege. The grounds of exclusion have been stated more fully by Nārada to be five-fold[1] :—(1) *vacana* (injunction or the text of the law),

[1] Nār. IV. 157.

Cf. दुष्टत्वात् प्रतिषिद्धत्वादकृतत्वादनिश्चयात्।
एकाङ्गविकलत्वाच्च स्यादसाक्ष्यपि पञ्चधा॥

दुष्टत्वादसाक्षी चोलादिः, प्रतिषिद्धत्वात् श्रोत्रियादिः, अकृतत्वात् स्वयंभूः, अनिश्चयात् मिथोभिन्नगीः, एकाङ्गविकलत्वात् शतान्तर इत्यर्थः—Sc., p. 187.

(2) *doṣa* (defects and shortcomings), (3) *bheda* (contradiction, *i.e.*, inconsistency between the statements made by different witnesses), (4) *svayamukti* (self-assertion, *i.e.*, non-appointment) and (5) *mṛtāntaratva* (intervening decease, *i.e.*, the death of the party in whose favour deposition is to be given by witnesses). Thus the *śrotriyas*, the aged and the religious devotees and recluses have been excluded on the strength of injunctions from some higher and more remote authorities. Both Nārada and Yājñavalkya distinctly say that no special reason has been stated for their exclusion.[1] We shall see, however, that according to commentators and digest-makers these exclusions are not without reasons. From what they say it appears that the persons excluded on the ground of *vacana* were regarded after all to be privileged not to appear in courts of justice as witnesses. The second ground for exclusion is a very important one and will just be discussed. The third ground on which witnesses are to be rejected is the inconsistency between their statements.[2] It is evident that this ground of incompetency will not appear until after all the witnesses summoned for a purpose have been sworn and their examination has proceeded to a considerable extent or perhaps even finished. The fourth ground for exclusion, *viz.*, *svayamukti*, has been discussed above. The fifth ground of exclusion[3] has been explained thus : suppose a party intending to produce a certain person as witness simply says to him 'You are my witness' but does not specify to that person or to his own sons and relatives the subject on which he wants the evidence to be given. Now if the party, be he the plaintiff or the defendant, dies, the witness chosen by him will be rendered incompetent by intervening decease. The reason assigned to his incompetency is that in such a case nobody knows the particular point or points on which he is to be

[1] Nār. IV. 158. Yāj. II. 71.
[2] Nār. IV. 160.
[3] Nār. IV. 162.

examined, and there being nothing to ascertain whether the statement he makes is true or false, it will be impossible to sue him for perjury if he gives false evidence even.[1] The general rule of law about the incompetency of a witness by reason of intervening decease is, however, relaxed so far as to render admissible his evidence if the party being under the impression of impending death makes a declaration as to the matters to which the witness is to bear testimony.[2] Evidently this relaxation is allowed partly on the ground of necessity and partly from the consideration that on such an occasion the party has no interest in deceiving by telling an untruth. The rule is further relaxed in the six cases of ordinary deposit, deposit for delivery, sale, theft, gift and loan for use.[3] It is laid down that in these cases the incompetency of a witness on the ground of intervening decease will disappear if it is found that there is a declaration regarding the particular points of evidence from the deceased party which was made by him in a good state of health even.

With respect to *doṣa*, the second ground of exclusion. We know from different authorities that *dūṣita*, *pratidūṣita* and *dṛṣṭadoṣa* are all excluded witnesses.[4] *Dūṣita* is the same as *pratidūṣita* and means 'those who are tainted by mortal crimes or numerous smaller offences' according to Medhātithi, Kullūka and Rāghava.[5] In the opinion of other commentators *dūṣita* is

[1] एतदीदृशं साक्षित्वमसौ साक्षी तस्मिन्न सति चार्थिनि मृते कस्याये वदतु। तदा तस्मिन्न सति तं कूटसाक्ष्यदातारं को दण्डयतु। अथान्यतरान्तरः साक्षी अभ्रमाणः।—Asahāya on Nār. IV. 162. See also Sc., p. 188, and Mit. on Yāj. II. 68 and 69.

[2] मृतान्तरोऽर्थिनि प्रेते मुमूर्षुश्चावितादृते—Sc., p. 188.

[3] श्रावितोऽनातुरैश्चापि यस्यार्थो धर्मसंहितः।
मृतेऽपि तत्र साक्षी स्यात् षट्सु तन्वाहितादिषु॥
न्यासान्वाहितविक्रीते हृते दत्तेऽथ याचिते।—Sc., p. 188.

[4] Manu VIII. 64, Viṣ. VIII. 3, Yāj. II. 71, Nār. IV. 177.

[5] दूषिता पातकिनोऽभक्ष्योपपातकाद्य—Medh. on Manu VIII. 64, महापातकादिदूषिताः —Kull.

identical in meaning with *abhiśasta* of Viṣṇu and *Yājñavalkya*.[1] The word *abhiśasta* means, according to the Mitākṣarā, 'accused of murdering Brāhmaṇas and like offences.'[2] Julius Jolly takes it in the sense of a 'man of bad fame.'[3] *Dṛṣṭadoṣa* means, according to Medhātithi, either 'those who have practised something prohibited' or 'those who are known to have committed perjury on some other occasions.'[4] Kullūka supports the latter view and the commentary on Nārada-*smṛti* also says nearly the same thing.[5] The Mitākṣarā takes the word to mean 'those whose habit of speaking falsehood has been detected,' and Aparārka explains it as 'thieves and the like.'[7] It is clear that both *dūṣita* and *dṛṣṭadoṣa* violate the moral principles of life by the commission of forbidden acts and considered in this light they are one and the same. Medhātithi notes it and observes that still there is this distinction between them ; a *dṛṣṭadoṣa* has and a *dūṣita* has not been convicted of and punished for the offences committed respectively by them, and as such the former stands on a higher level on account of his being brought under discipline after having paid to the king the penalty for his crime.[8] *Dṛṣṭadoṣa*, according to Medhātithi, is thus exactly the same as *dhṛtadaṇḍa* (one who has been punished by the government) excluded from the category of witnesses by Kauṭilya.[9] Nārada rejects by name, on

[1] According to Nārā. and Nand.

[2] अभिशस्तोऽभियुक्तो ब्रह्महत्यादिना—Mit. on Yāj. II. 70.

[3] S.B.E. (Vol. VII), p. 48.

[4] दृष्टदोषा अन्यत्र कृतकौटसाक्ष्या अन्यदा प्रतिषिद्धमाचरितवन्तः—Medh. on Manu VIII. 64.

[5] स्थानान्तरावगतकौटसाक्ष्याः (Kull.), दृष्टदोषस्तु अन्यकार्येषु कूटसाक्षित्वादिना ज्ञायते—
Asahāya on Nār. IV. 177.

[6] दृष्टदोषो दृष्टवितथवचनः—Mit. on Yāj. II. 71.

[7] दृष्टदोषः स्तेनादिः—Aparārka on II. 71.

[8] दृष्टदोषग्रहणन्तु तेषामेव (दूषितानामेव) कृतनियहाणां परिग्रहार्थम्। ते हि राजनि शतदण्डा याचितविनयत्वान्न संप्रति दूषिता भवन्ति—Medh. on Manu VIII. 64.

[9] Kau. III. 11. 68.

the ground of *doṣa*, such dangerous characters as *stena* (a thief), *sāhasika* (one who has committed *sāhasa*, or a heinous crime, *i.e.*, a desperado), *caṇḍa* (one who gets wildly excited), *kitava* (a veritable rogue, a gamester or a cheat) and *vadhaka* (an assassin, or one who takes animal life, *e.g.*, a butcher).[1] Other persons excluded[2] evidently on this ground are *ārtta* or *vyasanī* (one addicted to vicious practices), *naikṛtika* (an impostor), *cākrika* (one always busy with fraudulent devices), *śaṭha* (a knave or swindler), *kūṭakāraka* (one who forges a document),[3] *agnida* (one who sets fire to a house, *i.e.*, an incendiary), *garada* (one who administers poison to another with a view to kill him), *vaktavya* (an infamous person), *kināśa* (a niggardly person), *aupapātika* (one who has committed an *upapātaka*, *i.e.*, a minor sin), *patita* (one degraded in society), *nirdhana* (one who has become indigent by losing his whole wealth through gambling or other extravagances), *aghaśaṁsī* (a man reporting or telling other's sin or guilt, *i.e.*, a malicious person making public the failings of others), *nirdhūta* (a man deserted by his relative and friends), *bhedakṛt* (one whose business is to cause dissension, *i.e.*, one who causes friends and others to fall out with one another), *śreṇīgaṇavirodhī* (one who goes against his tribe and guild), *mitradhruk* (one who rebels or plots against his friend), *dāratyāgī* (one who has forsaken his wife for no reason) and *pitrā vivadamāna* (one who quarrels with his father). Now *doṣa* means a defect and the defect in the case of the persons referred to in this section consists obviously in their antecedent misconduct or infamy of character. From the nature of the numerous rejections made by different authorities it will become clear, however, that not only the defect of character but various other defects also were regarded as

[1] Nār. IV. 159.

[2] Nār. IV. 177-187 ; Yāj. II. 70-71.

[3] This term may be similar in meaning with *Kūṭakṛt* of Yājñavalkya (II. 82). *Kūṭakṛt* has been explained by the Mitākṣarā as a *suborner*.

grounds of incompetency. These defects may be described as feeling of partiality arising out of interest, want of reasoning faculty resulting from deficiency or immaturity of intellect or from disease of body or of mind, fickleness of nature, deficiency in the requisite religious knowledge and want of religious belief, complete dependence or servitude, low status, low birth, low profession and other low conditions and circumstances in life. We shall now proceed in this connection to prepare a list of other incompetent witnesses and classify them according to the causes of their incompetency.

(a) *Incompetency from Interest.*

1. *Arthasambandhī.*[1]—The expression means an interested person in general. The Mitākṣarā and Smṛticandrikā take it to mean 'one who is interested in the matter in contest.'[2] Medhātithi, Kullūka and Rāghava explain it as 'persons connected by money, *i.e.*, the creditor and the debtor of the parties.'[3] This explanation gets a clear support from Kauṭilya in whose opinion *dhanika* (creditor) or *dhāraṇika* (debtor) cannot be admitted as a witness for or against each other.[4] Medhātithi assigns the following reason for their incompetency :—'the debtor of a litigant party is likely not to tell the truth if it occurs to him that by his giving a faithful account of the transaction he may be a cause of defeat to his creditor, for the simple reason that the creditor may then, being highly displeased, press for the immediate payment of debt. Similarly when the debtor happens to be a party and a poor man at the same time, the creditor may be swayed by the consideration that if by the instrumentality of his evidence his debtor wins the

[1] Manu VIII. 64, Viṣ. VIII. 3, Yāj. II. 71, Nār. IV. 177, Vas. XVI. 3.

[2] विप्रतिपद्यमानार्थसम्बन्धी—Mit. on Yāj. II. 71, विप्रतिपद्यमानार्थस्य सम्बन्धिनः—Sc., p. 177.

[3] स्वार्थार्थसम्बन्धिनोऽधमर्णाद्याः—Kull.
उत्तमर्णाधमर्णाद्याः—Medh.

[4] Kau. III. 11. 63.

case then there may arise at least a chance of the recovery of his dues.' The interest in the case of the debtor evidently arises from a dread of oppression or vexation and that of the creditor from a prospect or pecuniary loss being avoided. Medhātithi further suggests that *artha* may be taken in the sense of need or necessity as well and hence if it is known that a witness stands in need of any service or help from the parties or the parties from him, then also he will be disqualified.[1] In the opinion of Nandana the expression *arthasambandhī* has been used to signify those who have already received benefits from one of the parties.[2] The ground of objection to the admissibility of such witnesses as well as of those who are in need of any service or help from either of the parties obviously is that their testimony is likely to be tainted with partiality inasmuch as they will not wish success to the party that has the right on his side but to him from whom they expect to get or have already got certain considerations, pecuniary or otherwise. The interest in the case of these persons originates from a feeling of obligation or expectation. In modern days objection on the ground of personal interest in the success or defeat of either of the litigant parties goes to the credibility rather than to the competency of a witness.

2. *Sahāya*.[3]—Medhātithi and Devaṇabhaṭṭa explain it as 'sureties and the like'[4] and Kullūka as 'servants.'[5] R. Sham Sastri translates the word occurring in Kauṭilya by 'co-partner.' We are bent upon taking this word in its natural sense, *viz.*, helper, accomplice, etc., and in doing so we are supported by the Mitākṣarā and the commentary on Nārada-*smṛti* according

[1] Medh. on Manu VIII. 64.

[2] S. B. E. (Vol. XXV), p. 265, fn.

[3] Manu VIII. 64, Viṣ. VIII. 3, Kau. III. 11. 63, Yāj. II. 71, Nār. IV. 177.

[4] सहायाः प्रतिभूप्रभृतयः—Medh. on Manu VIII. 64. See also Sc., p. 177.

[5] सहायास्तत्परिचारकाः—Kull. on Manu VIII. 64.

to which the word means 'those who are of the same acts' and 'those who do a thing conjointly.'[1] Besides being an immoral and infamous person and thus capable of disregarding the sanctity of an oath, a *sahāya* (accomplice), as a partner in guilt, is also greatly interested in the result of the suit or question at issue and his interest has its obvious source in a desire to save himself from punishment even at the cost of the accused and other guilty associates and as such the true ground of objection to his testimony becomes quite manifest.

In modern times though accomplices are not like ordinary witnesses in respect of credibility and though there is an increasing tendency to insist that the evidence of an accomplice must be corroborated and thus the presumption that an accomplice is unworthy of credit unless corroborated in material particulars has become a rule of practice of almost universal application, yet an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Of course, 'the testimony of accomplices who are naturally interested and nearly always infamous witnesses is admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice.'[2] This principle of necessity was fully recognised by ancient law-makers of India and it was on this principle alone that they made rules against too strictly examining the competency of witnesses in urgent criminal suits.[3]

3. *Āpta* and *Bandhu*.[4]—Kātyāyana gives a very comprehensive definition of the term *āpta*. According to him it includes

[1] सहाय एककार्यः—Mit. on Yāj. II. 71.
एकार्यसम्भूयकारिणः—Asahāya on Nār. IV. 177.

[2] Woodroffe and Ameer Ali—The Law of Evidence, pp. 877-79.

[3] Manu VIII. 72, Yāj. II. 72, Gau. XIII. 9, Viṣ. VIII. 6, Nār. IV. 189.

[4] Manu VIII. 64, Nār. IV. 177, Yāj. II. 71.

case of these persons obviously arises out of domestic and social relations. The reason why a *bandhu* in particular cannot be called upon as a witness even in urgent criminal cases where laxity of rules is allowable to a certain extent has been indicated by Nārada also. He says that a *bandhu* cannot be a witness for the reason that he may depose falsely in favour of the party he supports out of the affection he bears towards him.[1] Manu is, however, of opinion that on the failure of qualified witnesses and in very exceptional circumstances a *bandhu* may be allowed to depose.[2] This rule of Manu refers to all criminal cases according to Govindarāja and Kullūka but Nārāyaṇa thinks that it applies only to cases concerning loss of life.[3] Medhātithi comments that a *bandhu* may be admitted as witness only if he is not very nearly related.[4] The Arthaśāstra relaxes the rule of incompetency to a certain extent in respect of priests, teachers, pupils, parents and sons. Kauṭilya distinctly says that teachers, priests and parents may serve as witnesses only in favour of and not against (*anigraheṇa*, *lit.*, without causing defeat or punishment) their respective pupils *yajamānas* and sons and *vice versa*.[5]

It should be noted after all that our laws do not stand quite isolated in disabling kindreds, relatives and friends from acting as witnesses. We may read the following observation with interest. "In the laws of some countries blood relationship within certain degrees has been made a ground of incompetency ; and friendship or enmity with one of the litigant parties

[1] Nār. IV. 191.

[2] Manu VIII. 70.

[3] अन्तर्वंश्मादौ उक्तसाक्ष्यभावे सति ...—Kull. on Manu VIII. 70. See also S. B. E. (Vol. XXV), p. 266. fn.

[4] यो नातिप्रत्यासन्नः स वदति—Medh. on Manu VIII. 70.

[5] आचार्यः शिष्याणां मातापितरौ पुत्राणां चानिग्रहेण साक्ष्यं कुर्युस्तेषामितरे वा ... ... —Kau. III. 11. 63. Prof. Shama Sastri reads अनिग्रहेण and translates it as 'on the side of prosecution.'

may justly cause evidence to be looked on with suspicion." [1] In the English Law of Evidence though interest originating from any source goes merely to the credit of the witness, yet it still retains in most criminal cases, as it retained in most civil cases previous to the Evidence Act of 1853, the incompetency of husband and wife to give evidence for or against each other on the ground of unity of interest and unity of person.

4. *Ripu.*[2]—An enemy is not a competent witness obviously for the reason that he is an interested person, his interest arising from a desire of revenge. Nārada distinctly says that he may give false evidence with a view to take revenge on the party inimically disposed towards him and thus should be rejected even in exceptional circumstances.[3]

5. *Adhyadhīna and Dasyu.*[4]—An explanation of these words can be given in the light of Manu's Verse 70 (Ch. VIII) where it is laid down, "On failure of qualified witnesses evidence may be given in urgent criminal suits by a woman, by an infant, by an aged man, by a pupil, by a relative, by a *dāsa* (slave) and by a *bhṛtaka*" (hired servant). These persons who cannot testify under ordinary circumstances are permitted to do so when special cases arise; this is the purport of the verse. Thus all of them, it is to be understood, are ordinarily excluded persons. Now nowhere in Manu have *dāsa* and *bhṛtaka* been declared disqualified, the persons excluded are *adhyadhīna* and *dasyu*. So it is only reasonable to suppose that *adhyadhīna* and *dasyu* are the same as *dāsa* and *bhṛtaka*. At least this is the opinion of Medhātithi who explains these four terms, *viz.*, *adhyadhīna*, *dāsa*, *dasyu* and *bhṛtaka* as follows :—*adhyadhīnaḥ garbhadāsaḥ* (a born slave and such other

[1] Best on Evidence, p. 184.

[2] Kau. III. 11. 63, Manu VIII. 64, Nār. IV. 177, Viṣ. VIII. 3, Yāj. II. 71.

[3] वैरनिर्यातनादपि:—Nār. IV. 191. See also IV. 190.

[4] Manu VIII. 66.

persons who are entirely subservient to others) ; *dāsaḥ garbhadāsaḥ* ; *dasyuḥ bhṛtadāso vaitanikaḥ* (a servant engaged on fixed wages) ; *bhṛtakaḥ vaitanikaḥ*.[1] Medhātithi thus makes it clear that since *dasyu* is one who is engaged on fixed wages, he is not wholly dependent on others and as such different from *adhyadhīna*. Macdonell and Keith point out that *dasyu* and *dāsa* have been used in the Rigveda in the sense of both 'aborigines independent of Aryan control' and 'subjugated slaves'[2] and it is interesting to see that the commentator Nandana takes the word *dasyu* to mean 'a low-caste man' which is allied to the former meaning. Bühler also is inclined to take the word in this sense and remarks that the term denotes properly the aboriginal robber tribes and includes all those resembling them.[3] Medhātithi points that as thieves and robbers are rejected by Manu separately, *dasyu* should not be taken as referring to them.[4] Nārada does not use the word *dasyu* and according to him *dāsa* (a slave by birth) and *ātmavikretā* (self-sold, *i.e.*, one who has become a slave himself for money) are among the persons disqualified as witnesses.[5] The word used by Viṣṇu is *parādhīna*, *i.e.*, one not his own master.[6] This term is a wide one in significance and comprises the meanings of the pairs of words used by Manu and Nārada. The reason why servants and those wholly dependent on others cannot give evidence for their masters and employers has been suggested by Medhātithi as follows :—These people live upon the wages they earn and thus it is not possible for them to displease their masters and employers, for in that case they might be deprived

[1] Medh. on Manu VIII. 66.

[2] Vedic Index, Vol. II, p. 388.

[3] S. B. E. (Vol. XXV), p. 266, fn.

[4] चौरस्य तु शब्दान्तरोपादान दस्युशब्देन शब्दम्—Medh. on Manu VIII. 66.

[5] Nār. IV. 178 and 183.

[6] Viṣ. VIII. 2.

of their means of subsistence.[1] So according to this commentator the incompetency of slaves and servants to testify against their masters and employers, rests on the ground of interest having its source in a thought about the future. They should also be generally disqualified, he goes on to say, for the reason that they are people earning very low wages and of low mode of living and thus it is quite natural for them to give way to greed and so they are unfit to be trusted.[2]

(*b*) *Incompetency from Want of Reasoning Faculty.*

1. *Bāla* or *śiśu*.[3]—Nārada divides infancy into two stages. A child is comparable to an embryo in its mother's womb up to the eighth year : after this and till he is sixteen years old, he is termed a *bāla* or *pogaṇḍa*.[4] Asahāya remarks that in the first stage of infancy a child cannot even perform purificatory and other religious ceremonies; from his eighth year onwards he may perform such ceremonies and commence sacred study but till he is sixteen years old he is a minor (*pogaṇḍa*), *i.e.*, incapable of transacting legal business.[5] Medhātithi and Kullūka think that this incapacity to enter into any legal transaction is a cause of his incompetency to be a witness.[6] It deserves to be noted here that Kauṭilya broadly excludes all persons who are legally unfit to carry on transactions.[7] Medhātithi further thinks that a child does not properly understand what evidence is and is rejected for his fickleness of mind and

[1] कर्मजीवनलापत्ती तथाविधानां जीविकोच्छेदः—Medh. on Manu VIII. 66.

[2] लघुवृत्तित्वाच्च लोभादिसम्भवेनाप्रत्ययिततापि—Medh. on Manu VIII. 66.

[3] Manu VIII. 66, Viṣ. VIII. 1, Yāj. II. 70, Nār. IV. 178.

[4] गर्भस्थसदृशौ ज्ञेय आष्टमाद् वत्सराच्छिशुः ।
बाल आषोडशाद् वर्षात् पौगण्ड इति गद्यते ॥—Nār. IV. 35.

[5] गर्भस्थसदृशः शौचाद्यक्षमः आष्टमात् परतः शौचाध्ययनक्षमः । पौगण्डश्च व्यवहारक्षमः ।
—Asahāya on Nār. IV. 35.

[6] शिशुर्बालोऽप्राप्तव्यवहारः—Medh. on Manu VIII. 66; न बालोऽप्राप्तव्यवहारत्वात्—Kull. on Manu VIII. 66.

[7] Kau. III. 11. 63.

immaturity of intellect.[1] Devaṇabhaṭṭa says that the causes of untruthfulness are very prominent in a minor and this is why he should be excluded.[2] Manu renders him competent however, under special circumstances, but Nārada rejects him absolutely on the assumption that he has no understanding faculty.[3]

Now as to the exact period of minority. We have seen how a minor (*bāla* or *poganḍa*) has been defined. The expression आषोडशात् occurring in the definition is ambiguous on account of the particle आ which has the sense of 'until' and may signify either *abhividhi* (limit inclusive) or *maryādā* (limit exclusive). As a matter of fact the expression has given rise to a controversy as to whether the minority of a person terminates at the beginning or at the end of the sixteenth year. It has been noted that a minor (*poganḍa*) is so called from his incapacity to transact legal business. So it follows that when this incapacity ceases, minority also comes to an end. There is a *smṛti* text which declares quite unambiguously that a person becomes eligible to enter into civil transactions just in his sixteenth year.[4] So according to this text the minority of a person expires just at the end of his fifteenth year. Śrīkṛṣṇa Tarkālaṅkāra in his Dāyabhāgaṭīkā supports this view.[5] Devaṇabhaṭṭa takes the opposite view, that is to say, according to him minority extends till the completion of the sixteenth year.[6] Julius Jolly and Sen accept this view as a correct one.[7] Mayne refers to the

[1] ..... असामर्थ्याद् बालादयः साक्षिले निरस्ताः। न ह्येते सात्यमवधारयितुं शक्नुवन्ति बुद्धेरस्थैर्यात् ... ... —Medh. on Manu VIII. 70.

[2] व्यक्तादृतहेतुशालिनो बालादयो वर्ज्याः—Sc., p. 182.

[3] Manu VIII. 70, Nār. IV. 190 and 191.

[4] पुंसां तु षोड़शे वर्षे जायते व्यवहारिता—Tagore Law Lectures (Jolly), p. 283.

[5] अप्राप्तव्यवहारा बालकाः पञ्चदशवर्षानधिकवयस्काः।—Dāyabhāgaṭīka, 3. 11. 17.

[6] त्रिंशत्पूर्णषोडशवर्षेः—Sc., p. 178.

[7] Jolly—Tagore Law Lectures, 1883, p. 83.
Sen—Hindu Jurisprudence (Tagore Law Lectures, 1909), p. 300.

difference of opinion existing between the old Hindu writers on the subject and concludes that in Bengal the duration of minority was full fifteen years, while in Mithila, Benares and Southern India it was full sixteen years.[1]

The main point to note is that by rejecting minors our authorities reject in general all persons under a definite age. This may appear to be arbitrary on the ground that children of the same age often differ immensely in their intellectual capacity, memory and power of observation, but if we look to the old laws of other countries it will be clear that our law does not suffer by comparison. The following remarks made by an eminent authority will be read with interest. "The general rule of the civilians, subject, however, to several exceptions, was that persons under the age of puberty were incompetent to give evidence. Some of their authorities say that minors under twenty years were rejected in criminal cases." "The jurisprudence of ancient Rome rejected the testimony of minors in general ...." "Sir Edward Coke in his First Institute states broadly that a person 'not of discretion' cannot be a witness ; and in another part of the same work he defines the age of discretion to be fourteen years." [2]

In modern times understanding has become the 'sole test of competency' and no precise age is fixed within which a child is to be excluded from giving evidence. 'The evidence of a child of tender years, even when he is eight or nine years old, is often received only if it appears that he is possessed of that degree of understanding which enables him to give a rational account of what he has seen or heard or done on a particular occasion.'

2. *Vṛddha*.[3]—A man of extremely advanced age (*ativṛddha*, according to Viṣṇu)[4] is disqualified as a witness, as his memory

[1] See Sen's Hindu Jurisprudence, p. 300.
[2] Best on Evidence, pp. 141 and 142.
[3] Manu, VIII. 66, Yāj. II. 71, Nār. IV. 178.
[4] Viṣ. VIII. 3.

is naturally weak and may fail him too often.[1] According to the Mitākṣarā the term *vṛddha* signifies 'a person at least 80 years old' and according to Aparārkabhāṣya 'one above 70 years of age.'[2] In modern times an aged man just like a minor is a competent witness provided that he is not prevented by his old age from understanding and answering the questions that might be put to him by the court.

3. *Jaḍa*.[3]—An idiot or a dull-witted fellow. He is born irrational (*mūḍha*) and thus *non compos mentis* from his nativity. He does not understand what is right and what is wrong on account of his internal faculty being very defective.[4]

4. *Pramatta*.[5]—He is a blundering fellow and thus cannot be relied on.

5. *Matta*.[6]—He renders himself devoid of sobriety by his own vicious act such as drinking liquors[7] and thus cannot be expected to rationally answer the questions that might be propounded to him in course of his examination. Devaṇabhaṭṭa remarks that his incompetency is due to the reason that he deprives himself of his understanding by taking some such

[1] वृद्धो वयःपरिणामादसंस्कृतिः (Medh. on Manu, VIII. 66), प्रायेण स्मृतिभ्रंशसंभवात् (Kull.) वृद्धो जरावशेन स्खलितबुद्धिः—Sc., p. 178.

[2] वृद्धोऽशीतिकादरः (Mit. on Yāj. II. 71), वृद्धः सप्ततिमतिक्रान्तः (Aparārka). *Cf.* आधोऽब्दाद् भवेद् बालः यावत् क्षीरप्रवर्तकः। मध्यमः सप्ततिं यावत् ततः परं वृद्ध उच्यते॥

[3] Nār. IV. 182.

[4] जड़ो निरिन्द्रियः (Asahāya), जड़ो मन्दबुद्धिः—Aparārka, Pds. and Sc. जड़ोऽप्रतिपत्तिमान् (Medh. on Manu VIII. 148). जड़ो विकलबुद्धिः—(Kull.). जड़ो मूढः (Vācas), जड़ो मूढः (Aparārka on Yāj. II. 140). जड़ो विकलेन्द्रियः हिताहितावधारणाक्षम इति यावत् (Mit. on Yāj. II. 140).

[5] Nār. IV. 178.

[6] Yāj. II. 70, Manu VIII. 67, Viṣ. VIII. 1, Nār. IV. 178.

[7] मत्तः पानादिना (Mit. on Yāj. II. 70), मत्तो मदनीयद्रव्येण (Mit. on Yāj. II. 32). रसेन मत्तः मदमत्तः चौर्य, अपकारस्वरूपेण: (Medh. on Manu VIII. 67) मत्तो मद्यादिना (Aparārka on Yāj. II. 32).

intoxicating thing as *dhattūra* (white thorn-apple).[1] The modern legislation considers him competent during the interval in which sobriety returns to him.

6. *Unmatta.*[2]—Medhātithi explains the term by *piśācakī* and Vijñāneśvara by *grahāviṣṭa*. These expressions literally mean 'one possessed by a demon or evil spirit' and are intended to signify a lunatic whose insanity is caused by its influence. This we know from a fuller explanation of the term *unmatta* given by Vijñāneśvara. Here he says that it denotes a lunatic whose insanity is caused from disorders of the aerial humours, of bile, of phlegm or of these three combined or from the possession of a *graha* (demon).[3] In enumerating the causes of insanity, it may be noted, the great commentator strictly follows the Hindu pathology where it is stated that a demon can produce insanity in a person by taking possession of him in his unguarded moment.[4] Nārada excludes this kind of lunatics under the distinct designation of *bhūtāviṣṭa*.[5] Aparārka explains the term *unmatta* simply as one afflicted with the illness *unmāda* and does not say anything about its causes.[6] The general characteristics of this disease are confusion of intellect, disordered state of mind, bewildered gaze, unsteadiness, inconsistency of speech and absence of memory.[7] A *bhūtāviṣṭa* lunatic has some other special features. His speech, strength, valour and action are not like

[1] धत्तूरादिमदनीयद्रव्येण खलितबुद्धिः—Sc., p. 184.

[2] Manu VIII. 67, Viṣ. VIII. 1, Yāj. II. 70, Nār. IV. 178, Kau. III. 11. 63.

[3] Mit. on Yāj. II. 32 and II. 140.

[4] Caraka Saṁhitā, Ch. VII (उन्मादनिदान).

[5] Nār. IV. 183.

[6] *Unmāda* is 'mania' according to Jolly (Tagore Law Lectures, 1883, p. 275). Aparārka mentions, however, 'possession by demon' as one of the causes of insanity in course of his explanation of Yāj. II. 32.

[7] धीविभ्रमः सत्त्वपरिप्लवश्च पर्याकुला दृष्टिरधीरता च।
अवद्यवाक्त्वं हृदयस्य शून्यं सामान्यमुन्मादगतस्य लिङ्गम् ॥
Bhāvaprakāśa (उन्मादाधिकार).

those of a human being though he is possessed of understanding, knowledge and capacity, and the period of his insanity is not certain.[1] Thus the grounds of the incompetency of lunatics to become witnesses become quite clear In modern jurisprudence also a lunatic is generally an incompetent witness on the ground that 'he has sometime his understanding and sometime not and is thus called *non compos mentis* so long as he hath not understanding.' It is recognised, however, that a lunatic may have lucid intervals and thus if it appears that he is not prevented by his lunacy from understanding the questions put to him and giving rational answers to them, then there will be no bar to examining him. It is further held that monomaniacs, *i.e.*, those who are insane on one subject can be examined on matters not connected with their delusion. The leading case on the subject is R. *v.* Hill. Here a witness of the name of Donelly laboured under the delusion that he had 20,000 spirits personally appertaining to him but was perfectly sane on all other points. His delusion was not held to exclude him and he was examined as a regular witness.

7. *Vikalendriya.*[2]—The term is an explanation of the expression *nirindriya* occurring in Manu (IX. 201), according to Kullūka, and denotes blind and lame persons and the like.[3] The Mitākṣarā explains *vikalendriya* as one destitute of an ear or other organ[4] and *nirindriya* as one who has lost an organ of sense or action by disease or other cause.[5] According to Jagannātha

[1] दैवपत्तपिशाचादिगृहीतस्येमानि रूपाणि—

अमर्त्यवाग्विक्रमवीर्यचेष्टो ज्ञानादिविज्ञानबलादियुक्तः।

प्रकोपकालोऽनियतश्च यस्य दैवादिजन्मा मनसो विकारः॥ (आयुर्वेदसंग्रहः,—उन्मादाधिकारः)

अमर्त्यबलवीर्यपौरुषपराक्रमज्ञानवचनविज्ञानानि—अनियतश्च उन्मादकालः—Caraka, Ch. VII.

So according to Caraka his knowledge, understanding and capacity are also not like those of a human being.

[2] Manu VIII. 66, Yāj. II. 70.

[3] ये च कुणिपङ्गादयो विकलेन्द्रियाः—Kull. on Manu IX. 201.

[4] श्रोत्रादिरहितः—Mit. on Yāj. II. 70.

[5] निरिन्द्रियो निर्गतमिन्द्रियं यस्माद् व्याध्यादिना—Mit. on Yāj. II. 140.

the term *nirindriya* (which is no doubt synonymous with *vikalendriya* according to Kullūka) denotes 'lame persons and the like who are disqualified for acts ordained by the law.' He further says that the total, and not the partial loss of an organ is meant or at least complete inability to use it.[1] *Indriya* means also semen virile and thus *vikalendriya* may include the case of eunuchs who have been excluded by authoritative texts as well.[2] Kauṭilya provides for the disqualification of the blind, the deaf and the dumb by name.[3] It may be noted here that according to the Dharmaśāstras organic defects like dumbness, blindness, deafness, lameness, impotency and the like are the consequences of crimes committed in a former existence.[4] Manu distinctly says that persons suffering from them are despised by the virtuous on that account.[5] That they did not receive any sympathetic treatment in society is further clear from the Dharmaśāstras which state that they are unworthy to be entertained at *śrāddhas* and to sit in the company of virtuous people.[6] Such persons are incompetent to be witnesses, as Medhātithi and Kullūka say, on account of their perceptive faculties being defective.[7] The disqualification of these persons may point to the prevalence of very unscientific ideas but it deserves to be noted that formerly the English law also ranged at least the deaf and the dumb from birth under the head of idiots and excluded them from giving evidence. Now-a-days the case is quite different and those deficient in organs of sense are no longer incompetent witnesses. Even 'a witness who is unable to speak may give his evidence in any other manner he can make it intelligible as by writing or by signs and if it

[1] Tagore Law Lectures, 1883, pp. 273-274.

[2] Nār. IV. 179. 4. [3] Kau. III. 11. 63. [4] Manu XI. 49-52. Yāj. III. 209-211, Vis. Ch. XIV. [5] XI. 53. [6] Manu III. 150-167.

[7] शरीरपीडयोपलब्धिविकलत्वात्—Medh. on Manu VIII. 66.
विकलेन्द्रिय उपलब्धिवैकल्यान्न साक्षी—Kull.

appears that a deaf-mute is possessed of the requisite amount of intelligence and understands the nature of an oath, he may give evidence by writing if he knows to write or by signs which must be translated by an interpreter.'

8. *Vyādhyārtta.*[1]—Persons under severe illness. Kauṭilya particularly mentions by name *kuṣṭhī* (lepers) and *vraṇī* (those suffering from bodily eruptions) as incompetent witnesses.[2] So far as leprosy and eruptive diseases are concerned they have always been considered as carrying with them a sort of moral pollution in consequence of their being viewed as the consequences of vicious deeds committed in a previous existence such as the violation of Guru's bed, illicit connection with father's sister, mother's sister, brother's wife, son's wife, and so forth.[3] The evidence of a leper was thought inadmissible in India even after the establishment of British courts of justice. His incompetency has now been removed. The reason why persons afflicted with serious illness cannot be admitted as witnesses obviously is that sickness deprives them of their memory and understanding. Medhātithi and Kullūka say that such persons are liable to become angry or to forget facts and thus to make false statements.[4] The modern practice is to interrogate the witness before swearing him or to elicit the facts upon the examination-in-chief, when if his incompetency appears he will be rejected and 'such a witness is thought incompetent only when he is in such extreme pain as to be unable to understand or to answer questions or is unconscious as if in a fainting fit, catalepsy and the like.' The exclusion of *kunakhī* (one having diseased or deformed nails) and *śyāmadanta*[5] (one having black teeth) is also based on the

[1] Manu VIII. 64, Nār. IV. 177.

[2] Kau. III. 11. 63.

[3] Śātātapa Saṁhitā, Ch. V.

[4] पीडितस्य हि क्रोधविस्मृत्यादयो मिथ्यावचनता सम्भाव्यते—Medh on Manu. VIII. 64.
लोभरागद्वेषस्मृतिभ्रंशादीनामन्यथाभिधानहेतूनां सम्भवात्—Kull.

[5] Nār. IV. 184.

ground of disease. The former is supposed to have been a thief and the latter a drinker of spirituous liquor in previous existence.[1] That deformed nails and black teeth were regarded as loathsome diseases is clear from various texts of the Dharmaśāstras which describe the persons having these defects as sinners and unfit for invitation at *śrāddhas*.[2]

9. *Kṣuttṛṣṇopapīḍita* and *Klānta*.[3]—Those who are tormented by hunger and thirst, *i.e.*, those who suffer from their pangs, as well as those who are afflicted owing to physical labour caused by walking long distances, engagement in battle and so forth.[4] Such persons naturally become destitute of reason and understanding for the time being and hence their exclusion. Their disability is after all co-extensive with the cause and hence it may be presumed that when the cause was removed their incompetency ceased.

10. *Kāmārtta*.[5]—'A person tormented by love.' He may either be one who is actually separated from his beloved or one who is too much with her. Both of them are untrustworthy, Medhātithi says, on account of their mind being troubled either in devising means for getting her back or by the fear of separation from her.

11. *Kruddha*.[6]—A wrathful person. He is naturally deficient in reason and memory. Thus Medhātithi remarks that such a person having his mind entirely taken up with rage is unable to perceive things rightly or to remember them correctly.[7]

[1] Vas. XX. Viṣ XLV 4-5.

[2] Manu III. 153, Yāj. I. 22, Gau. XV.

[3] Manu VIII. 67. Nār. IV. 182. Manu uses the word श्रमार्त for क्लान्त.

[4] क्षुत्क्षीणपथी इतः क्षुत्तृषाभ्यां व्यथितः; श्रमः कायचेष्टाधिक्येन दूराध्वगमनयुद्धादिनोत्पन्नदेहार्तः—Medh. on Manu VIII. 67.

[5] Manu VIII. 67.

[6] Manu VIII. 67.

[7] क्रोधेन व्याप्तचित्तत्वान्न यावदनुभवति नानुभूतं स्मरति—Medh. on Manu VIII. 67.

(c) *Incompetency from want or deficiency of religion.*

1. *Nāstika.*[1]—An unbeliever or atheist.

2. *Bhinnavṛtta.*[2]—One holding heretical doctrines.

3. *Ācārahīna.*[3]—One who has renounced all customary observances.

4. *Pratyavasita.*[4]—A religious mendicant who has renounced his order.

5. *Asamāvṛtta.*[5]—A Brahmacārī who desists from returning home though he has finished his study.

6. *Vrātya.*[6]—A man of the first three classes who has lost his caste owing to the non-performance of the principal *saṁskāras.*

7. *Agnityāgī.*[7]—One who has discontinued keeping the sacrificial fires.

8. *Svadharmacyutakulika.*[8]—A man of high birth who has abandoned his religious principles.

9. *Śrānta.*[9]—(*Nissaṅga* according to the commentary of Asahāya). This corresponds to the expression *saṅgebhyo vinirgataḥ* of Manu[10] which means according to Medhātithi 'a householder who has renounced the Veda.'[11]

These people evidently show a distinct disregard for religion, some by their denial of the existence of God, some by their refusal to stick to their faith and others by their omission to comply with the requisite forms and ceremonies. We shall see that our law-givers fully realised the utility of exacting an oath as a condition precedent to the reception of evidence. Now the administration of oath will be an unmeaning formality to one who does not believe in a Divine being superior to man ready to punish any deviation from truth or who cannot be trusted with regard to his religious opinions. This really accounts for the rejection as witnesses of all persons who were

[1] Nār. IV. 180. [2] Nār. IV. 182. [3] Nār. IV. 179.
[4] Nār. IV. 185. [5] Nār. IV. 182. [6] Nār. IV. 180.
[7] Nār. IV. 180. [8] Nār. IV. 187. [9] Nār. IV. 182.
[10] Manu. VIII 65. [11] वेदसंन्यासिनो यद्वत्—Medh on Manu. VIII. 65.

in any way considered deficient in religion or rather had no fixed principles about it. The modern law on the subject will be noticed in the chapter on 'Oath.'

(d) *Incompetency from fickleness of Nature.*

Strī.[1]—Women are not eligible to give evidence even though they may be pure and possessed of high qualifications, says Manu, on account of their wavering mind.[2] Devaṇabhaṭṭa sees in the masculine gender in which Manu uses the words *gṛhiṇaḥ, putriṇaḥ,* etc., in verse 62 (Chap. VIII) a general prohibition against women to be witnesses.[3] Nārada uses actually the word *puruṣa* in the enumeration of qualified witnesses and states that the disqualification of women as witnesses is based upon the ground of their natural disregard for truth.[4] Medhātithi comments that ficklemindedness is the very nature of women and as such there cannot be any confidence in them though they may be highly qualified.[5] The general notions about women in ancient India were against any trust being placed in them in regard to legal matters, they being thought wanting in veracity and firmness of purpose. These notions are embodied in ancient cosmological speculations and the views of our law-givers were considerably influenced thereby as will be evident from the following extracts from Manu and Vasiṣṭha :—(1) 'when creating them Manu allotted to women a love of their bed, of their seat and of ornament, impure desires, wrath, dishonesty, malice and bad conduct '[6]

[1] Manu VIII. 77, Viṣ. VIII. 2, Yāj. II. 70, Kau. III. 11. 63, Nār. IV. 178.

[2] Manu VIII. 77.

[3] यद्दिह इत्यादिषु पुंलिङ्गनिर्देशो विवक्षितः, उपादेयमतत्वात् ।—Sc., p. 173.

[4] अनृतत्वात् स्त्री—Nar. IV. 191.

[5] प्रकृतिरेषा स्त्रीणां यदवदुषपलत्वम्—Medh. on Manu VIII. 77.

[6] Manu IX. 17.

and (2) 'women are the very embodiment of falsehood, this is known as a fixed rule.' [1] These statements may well be compared to the observations of Mascurdus and Virgil regarding the levity and want of veracity and honesty in women :— "Credence in general ought not to be given to women for the simple reason that they are women, and their usual habit is to be fraudulent, false and deceitful." "A fickle and ever-changing thing is woman."

We meet, however, with a rule of Manu to the effect that testimony of women can be admissible on matters peculiarly affecting themselves. He says : 'Women are to give evidence for women.' [2] Medhātithi's explanation is that the prohibition against the admissibility of women's evidence relates to cases where both the plaintiff and the defendant are males.[3] Vācaspatimiśra also remarks that the exclusion of women implies that they should not be allowed to give evidence for men.[4] When, however, the suit is between two females, or between a male and a female, there is no bar to women being witnesses.[5] "A curious (it is to be hoped rare) authority, cited by Mr. Macnaghten in his volume of authorities, will illustrate the sort of case to which the testimony of women would be admissible. A woman having committed adultery with her husband's younger brother sued him for her maintenance, and selected *his* wife as the witness, and the only one to prove the fact. The case being that of a female, the evidence though but of one single female was not only received, but held to be good and legal.[6]

[1] स्त्रियोऽनृतमिति विज्ञायते—Vas. V.
स्त्रियोऽनृतमिति स्थितिः—Manu IX. 9.

[2] Manu VIII. 68. (See also Vas. XVI.)

[3] यत्र पुमांसावर्थिप्रत्यर्थिनौ तत्र स्त्रीणां साक्ष्यं नास्ति—Medh. on Manu. VIII. 68.

[4] स्त्री पुंसां न साक्षिणी—Vy.-chintāmaṇi in manuscript.

[5] यत्र तु स्त्रिया सह पुंसः कार्यं स्त्रीणामेव चेतरेतरं सत्त्वं तत्र भवन्त्येव स्त्रियः साक्षिण्यः।—Medh. on Manu VIII. 68.

[6] Goodeve on Evidence, p. 63.

Medhātithi makes it clear that the intention of the rule women are to give evidence for women' is not to disqualify men from acting as witnesses for women but merely to ordain that women can be admitted as witnesses in suits relating entirely to women, though on rare occasions, on the consideration that the reason for their exclusion, namely fickleness, does not universally hold good, because there are some women who are as truthful as the best propounders of the Veda and have steadiness of purpose and of mind.[1]

The exclusion of women would appear contradictory to such injunctions as 'on failure of qualified witnesses evidence may be given by women.'[2] Medhātithi notes it and says that there is no inconsistency inasmuch as this injunction refers to cases where women can be questioned and examined just after the occurrence so that there cannot be any room for the suspicion that their mind has been tampered with by any person. When, however, there is an interval of time, it is quite possible that they, ficklеminded as they are, have been won over by the party whose case is weak and consequently should not be admitted as witnesses.[3]

It is evident from what has been said that the Hindu Law rejected the testimony of women generally if not absolutely. Muhammadan Law also rejected the evidence of women in charges of adultery and in some other cases. Best in giving a concise history of the matter says : "Nor were these merely Asiatic views. The law of ancient Rome while admitting the testimony of women in general refused it in certain cases. The civil and canon laws of mediaeval Europe seem to have

[1] न चायं नियमः स्त्रीणां स्त्रिय एव साक्ष्यं कुर्युः ... भवन्ति कासुचन स्त्रियो ब्रह्मवादिन्य इव सत्यवादिन्यः स्थिरबुद्धयश्च।—Medh. on Manu VIII. 68.

[2] Manu VIII. 70.

[3] यत्तु स्त्रियोऽप्यसम्भवे कार्या इति तद् यत्र तत्तत्सादेव पृच्छ्यन्ते यतेयमाश्रद्धा न भवति केनचिदासां चलितं मन इति। यत्र तु कालव्यवधानं तत्र लोभयमानेन कदाचिदनुकूलासा इति न क्वचित् साक्षिणः।—Medh. on Manu VIII. 77.

carried the exclusion much further. The following extract from the work of an able French jurist shows how long the principle held its ground on the Continent. 'After women had been admitted to bear testimony by an ordinance of Charles VI (of France) of the 15th November, 1394, it was long before their evidence was considered equivalent to that of a man.' In Scotland also until the beginning of the 18th century, female sex was, in the great majority of instances, a cause of exclusion from the witness-box and until 1868 was a disqualification for witnessing instruments. Even the old English lawyers occasionally rejected the evidence of women on the ground that they are *frail*. Sir Edward Coke in the reign of Charles I, without a single note of dissent or disapprobation writes thus: 'In some cases women are by law wholly excluded to bear testimony; as to prove a man to be a villain.' It seems also that in very early times their testimony was insufficient to prove issue born alive, so as to entitle a man to be tenant by the courtesy: neither could they prove the summons of jurors in an assize."[1]

This degrading incapacity has now been removed and the testimony of women is now universally admitted not only in the courts of Europe but in all those under British sway in India.

(e) *Incompetency from Low Status, Low Birth, Low Profession, etc.*

1. *Grāmabhṛta* and *grāmayājaka*.[2]—The former has been excluded by Kauṭilya and the latter by Nārada. A *grāmabhṛta* is one who has to depend for his maintenance on the people of a village. We find also the term *grāmabhṛtaka* used by Kauṭilya which seems to have the sense of a village servant.[3] We hear of a paid servant of the village in Manu also.[4] We

[1] Best on Evidence, pp. 55-56.
[2] Kau. III. 11. 63, Nār. 178.
[3] Kau. III. 5. 91.
[4] प्रेष्यो यामस्य '—Manu III. 153.

learn from another authority that *grāmabhṛtas* were Brāhmaṇas, though of very low order and status. They constituted the fifth and *grāmayājakas* (village priests conducting the religious ceremonies of all classes of people in their villages) the fourth class of degraded Brāhmaṇas.[1] The reason for the exclusion of the *grāmabhṛtas* and *grāmayājakas* is obvious. They derived their livelihood from each and every villager and it was their interest to see that they did not displease anybody. So they were naturally men of very weak principles and thus not reliable at all.

2. *Ayājyayājaka.*[2]—A priest conducting the religious observances of persons of bad fame not competent to offer sacrifices.

3. *Aśrāddha.*[3]—One not performing the *śrāddha* ceremony or not entitled to it. It may mean also one not admitted to *śrāddha*, *i.e.*, one not allowed to partake of obsequial feasts, *i.e.*, a Brāhmaṇa of low status and deeds.

4. *Kāruka.*[4]—*Kārukas* are those who earn their livelihood by some crafts. They are carpenters, weavers, barbers, washermen, shoemakers, cooks and the like.[5] They are excluded evidently on account of their low status. Kauṭilya characterises them as impure.[6] Medhātithi thinks that their exclusion is due also to a desire on the part of the state to avoid interference with their ordinary avocations.[7] It is a fact that they depend

[1] चत्राद्यास्तु षट् प्रोक्ता ऋषिणा तत्त्ववेदिना।
आद्यो राजभृतक्षेषां द्वितीयः क्रयविक्रयी॥
तृतीयो बडुयाज्यः स्यात् चतुर्थो ग्रामयाजकः।
पञ्चमस्तु भृतक्षेषां ग्रामस्य नगरस्य च॥

Attributed to Śātātapa by the Śabdakalpadruma.

[2] Nār. IV. 180. [3] Nār. IV. 178. [4] Manu VIII. 65.

[5] तक्षा च तन्तुवायश्च नापितो रजकस्तथा। पञ्चमश्चर्मकारश्च कारवः शिल्पिनो मताः॥

See the word कारु in Apte's Dictionary.

[6] शूद्रप्रायो हि कारवः—Kau. III. 12. 64.

[7] कारुकादीनां स्वकर्मोपरोधशङ्कया न साक्षित्वम्—Medh. on Manu VIII. 65.

much upon the goodwill of the people and this good will is sure to be lost if they have to act as witnesses, because it is the nature of men to be displeased with the witness through whose testimony they lose their case though it be a weak one.[1] Moreover *kārukas* are men of mean nature and as such may swerve from the path of honesty and become partial.[2] Kullūka's opinion is that their exclusion rests on the ground of their always being extremely busy with their own work.[3]

5. *Antyāvasāyī*.[4]—According to Asahāya the term means a *Caṇḍāla* (an outcast), *i.e.*, one born of a *Śūdra* father and Brāhmaṇa mother.[5]—Aparārka explains that a person born of a father inferior in caste to the mother is meant.[6]

6. *Ugra*.[7]—One born of a Kṣatriya father and Śūdra mother and whose business is to catch or kill animals dwelling in holes such as snakes.

7. *Śūdrāputra*.[8]—The son of a Śūdra woman, father's name and caste being unknown.

8. *Carmakṛt*.[9]—A shoe-maker or leather manufacturer. It may also mean 'one begotten by a fisherman on a *Caṇḍāla* woman.'

9. *Kuhaka*.[10]—A conjurer or a quack, *i.e.*, one who practises incantations and the like with mysterious formulas and medicines.

10. *Āhituṇḍika*.[11]—A juggler.

11. *Aindrajālika*.[12]—A magician.

[1] सङ्घत्या च ते जीवन्ति स्वभावश्चैषां जानपदानां यत् साक्षिकादिभ्यो रुष्यन्ति ततश्च सार्वलौकिकी सङ्गतिः कारुकादीनामुच्छिद्येत ।—Medh. on Manu VIII. 65.

[2] किञ्च प्रकृतिपरिलघुत्वात्तेषां वृत्तयश्चलयितुमपि शक्यन्ते तथा च पक्षपातं भजेरन् ।
—Medh. on Manu VIII. 65.

[3] स्वकर्मव्यग्रत्वप्रायेण तेषामसाक्षित्वम् ।—Kull. on Manu VIII. 65.

[4] Nār. IV. 182. [5] चन्द्रावसायी चण्डालः ।—Asahāya on Nār. IV. 182.

[6] चन्द्रावसायिनः प्रतिलोमजाः (Aparārka, p. 669). [7] Nār. IV. 184.

[8] Nār. IV. 181. [9] Nār. IV. 185. [10] Nār. IV. 185.

[11] Nār. IV. 181. [12] Nār. IV. 184.

12. *Vārdhuṣikadvija*.[1]—A Brahmin usurer. It may mean also a Brāhmaṇa who purchasing a thing at its usual price sells it at a much higher one.

13. *Vikarmakṛt*.[2]—One who follows an occupation forbidden by the scriptures, such as a Brāhmaṇa adopting the occupation of a Kṣatriya and a Kṣatriya that of a Vaiśya and so forth.[3]

14. *Manuṣya-paśu-māṃsāsthi-madhu-kṣīrāmbu-ghṛtavikretā Brāhmaṇa*.[4]—A Brāhmaṇa who sells ghee, water, milk, honey and the flesh and bones of men and beasts.

15. *Tailika*.[5]—An oilman, *i.e.*, an oil-grinder or oil manufacturer.

16. *Mūlika*.[6]—One who buys and sells roots or one who practises incantations with them.

17. *Paupika*.[7]—A seller of soup or broth.

18. *Śauṇḍika*.[8]—A distiller or seller of spirituous liquor.

19. *Viṣajīvī*.[9]—One who deals in or lives by poison.

20. *Lubdha*.[10]—A fowler.

21. *Bhagavṛtti*.[11]—Parāśara Dharmasaṃhitā and Smṛticandrikā explain this term as 'one who lives by the prostitution of his wife.'[12]—In Asahāya's opinion it may mean also one who suffers his mouth to be used like a female part.'[13]

22. *Kuśīlava*.[14]—A bard or singer.

23. *Śailuṣa (raṅgāvatārī)*.[15] An actor or dancer.

24. *Stāvaka*.[16]—A professional panegyrist.

Nār. IV. 186. [2] Manu VIII. 66.

[3] विकर्मकृत् शास्त्रविरुद्धं यः कर्म करोति। यथा ब्राह्मणः क्षत्रियवृत्तिं वैश्यो वेत्यादि।
—Medh. on Manu VIII. 66.

[4] Nār. IV. 186. [5] तिलाघाती (Pds.), Nār. IV. 182. [6] Nār. IV. 182.

[7] Aparārka, p. 669 (पौपिकः पक्वविक्रेता).

[8] Nār. IV. 181, (विषस्य संग्रहणरक्षणादिव्यापारे नियुक्तः—Pds. p. 79).

[9] Nār. IV. 184.

[10] Nār. IV. 184. [11] Nār. IV. 183. [12] स्वस्त्रये भार्यावेश्यात्वकारी (Pds. Sc. and Aparārka). [13] सुखभगो वा (Asahāya on Nār. IV. 183).

[14] Nār. IV. 179. [15] Nār. IV. 181. [16] Nār. IV. 187.

25. *Hīnasevaka.*[1]—One who serves a base or mean person.

26. *Cara.*[2]—A spy.

27. *Sūcaka.*[3]—A spy engaged by the king. His business is to declare the faults of others.[4]

28. *Varṣanakṣatrasūcaka.*[5]—A bad astrologer. The Viramitrodaya divides it into two terms : (1) One who prophesies rain, *i.e.*, a weather prophet and (2) an astronomer, *i.e.*, an astrologer.[6]

It must, however, be understood that a person was considered incompetent on the ground of his low status, low birth or low profession if he was to depose in a case where both the parties were high-class men. When one of the parties or both the parties happened to be low-class men, the witnesses called by them were necessarily to be of low class. We have already referred to the rules which demand that witnesses are to belong to the rank and class of the party by whom they are called and further that men of the lowest caste should give evidence for the lowest.

It has already been seen that certain people owing to their peculiar position and functions have been declared incompetent to give evidence and that the *śrotriyas* have been mentioned as foremost among them.[7] We shall now advert to the case of the *śrotriyas* but before doing so we shall do well to refer to the case of the king and king's men (*rājapuruṣa, i.e.*, government servants) who have also been rendered disqualified by several authorities.[8] The reason assigned for

[1] Nār. IV. 187.

[2] Nār. IV. 180.

[3] Nār. IV. 187. Pds. reads सूचक for सावक (p. 99).

[4] परदोषसूचनार्थं राज्ञा नियुक्तः (Pds. 99).

[5] Nār. IV. 183.

[6] Vīram., p. 159.

[7] Manu VIII. 65, Viṣ. VIII. 2, Yāj. II. 71, Kau. III. 11. 63, Nār. IV. 158.

[8] Manu VIII. 65, Viṣ. VIII. 1, Kau. III. 11. 63, Vas. XVI. 13. (The word actually used by Vas. is *rājanya* which generally means 'a member of the royal family.' But from the parallel passages of other Dharmasūtras, it seems probable that the king is meant by the term). For the disqualification of the *rājapuruṣa*, see Nār. IV. 185, Kau. III. 11. 63.

the disability of the king by the commentators Medhātithi and Kullūka is that he is the lord of all and as such incapable of being questioned and examined.[1] Devaṇabhaṭṭa remarks that as the king has to attend to diverse duties, he is not to be a witness.[2] We know from several texts that the king was to decide all law-suits either personally or through judges. He was thus represented by the tribunal and thus if he was held eligible to testify before it there would have arisen the absurdity of asking him to give evidence to himself. But as in modern times 'a judge is a competent witness and can give evidence in cases being tried before himself provided that he has no personal or pecuniary interest in the subject of the charge, and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part,' so in ancient times also the king sometimes waived his privilege and acted as a witness in cases about which he had a personal knowledge (*e.g.*, when an offence or contempt was committed in his presence and when he himself heard the speeches of the plaintiff and the defendant)[3] and which were found difficult to be decided on account of the scantiness of other kinds of evidence at hand. That this was the accepted view is clear from the fact that he is mentioned as one of the *akṛta* witnesses. Medhātithi rightly remarks that prohibition in the case of the king means that his evidence should not be preconstituted by requesting him to the effect 'you shall be my witness' at the time when one lends out money. The great commentator further states that the king should not appear in court as a regular witness of the ordinary class

[1] न च राजा साक्षिधर्मेण प्रष्टुं युज्यते ।—Medh. on Manu VIII. 65; प्रभुत्वात् साक्षिधर्मेण प्रष्टुमयोग्यत्वान्न राजा साक्षी कार्यः—Kull.

[2] नृपतिः बहुव्यापारव्याकुलत्वात् प्रतिषिध्यते ।—Sc., p. 178.

[3] राज्ञः पुरतोऽनस्य राजा साक्षी ।—Asahāya on the Nār. IV. 151.

अर्थिप्रत्यर्थिनोर्वाक्यं यच्च तं मुखता स्वयम् ।

स एव तत्र साक्षी स्याद् विसंवादे त्रयीरपि ॥—Aparārka, p. 667.

but if he so pleases, he may only corroborate the statements of other witnesses by written notes or certificates.[1] All this undoubtedly proves also that the difference that exists between incompetency and privilege was observed in ancient times as well. An incompetent witness could not be examined as a general rule but a privileged witness was allowed to depose and his testimony was legal if the privilege was not insisted upon. Kauṭilya insists, however, that the king can never be a witness not even in cases about which he only possesses a personal knowledge.[2] The modern idea seems to be that the king, if he so pleases, may be examined as a witness in any case, civil or criminal, but not without being sworn.

So far as the *rājapuruṣas* (government servants) are concerned, they have not been rejected by Manu, Viṣṇu and Yājñavalkya but by Kauṭilya, Nārada and Kātyāyana. According to Bṛhaspati *rājapuruṣa* is a technical name given to the officer of the court whose duty is to compel the attendance of the defendant, assessors and witnesses, to keep both the defendant and the plaintiff in custody if they have given no sureties and also to guard the witnesses.[3] Asahāya explains the word simply as *sevaka*, *i.e.*, a servant of the king.[4] This commentator thinks also that the term may, more particularly, be referred to the king's chief judge (*prāḍvivāka*).[5] A servant as a general rule is incompetent to testify according to Manu.

[1] त्वं मे साक्षी भविष्यसीति व्यवहारलुब्धता धनविसर्गादिकाले शपतिर्नाध्येषितव्यः ··· यद्यपि लेखादिना संवादयेत् ।—Medh. on Manu VIII. 65.

[2] रहस्यव्यवहारेषु राजतापसवर्जम्—Kau. III. 11. 63.

[3] आकारणे रक्षणे च साध्यर्थिप्रतिवादिनाम् ।
सभ्याधीनः सत्यवादी कर्तव्यस्तु स्वपूरुषः ॥
प्रत्यर्थिसभ्यानयनं साक्षिणाञ्च स्वपूरुषः ।
कुर्यादलग्नको रक्षेदर्थिप्रत्यर्थिनौ सदा ॥—Vīram., p. 42, Sc., p. 39.

[4] राजपुरुषः सेवक इति ।—Asahāya on Nār. IV. 185.

[5] तत्र राजपुरुषो दृष्टावकोटनार्थं तस्यानवसरे राजकीयचक्षुर्भूतो राज्ञा नियुक्तः प्राड्विवाकः ।
—Asahāya on Nār. II. 15.

This we gather from verse 70, Chap. VIII. Viṣṇu does not explicitly say anything about government servants but excludes all who are not their own masters.[1] Bodhāyana declares that serving the king constitutes a great guilt.[2] Regarding the *rājapuruṣas* and their incompetency Kātyāyana says the following: 'Those who are posted by the king in villages, towns and countries or in high offices or are dear to him are styled *rājapuruṣas*; they should not be asked any question as witnesses because they are always devoted to the king.'[3] Kātyāyana's prohibition does not apply at least in the case of *prādvivāka* who is mentioned as an *akṛta* witness, *i.e.*, one whose evidence though receivable on special occasions cannot be pre-appointed). We may assume that all high officials were competent witnesses though they enjoyed some sort of privilege and exemption. Kauṭilya holds a class of officers such as *yuktas*, *upayuktas* and *bhṛtakas* in suspicion and says that they should be very carefully watched over. 'It is possible to mark the movements of birds flying high up in the sky; but not so is it possible to ascertain the movements of the *yuktas* of hidden purpose'[4]—this is how he characterises such officers. The term *rājapuruṣa* occurring in Kauṭilya's list of incompetent witnesses is after all of doubtful connotation. It is practically certain, however, that it does not include all officers in service of the state but probably those just spoken of who were in the lower grades of the departments mainly connected with revenue and thus generally greedy and about the examination of whose conduct mainly he says so much.

[1] Viṣ. VIII. 2.

[2] III. 6. 5.

[3] नगरग्रामदेशेषु नियुक्ता ये पदेषु च।
यत्नभाजश्च न पृच्छेयुर्भक्ता ये राजपूरुषाः॥
—Aparārka on Yāj. II. 71; Sc., p. 180.

[4] अपि शक्या गतिर्ज्ञातुं पततां खे पतत्रिणाम्।
न तु प्रच्छन्नभावानां युक्तानां चरतां गतिः॥—II. 9. 27.

As to the *śrotriyas*, they have been excluded by Manu, Viṣṇu, Yājñavalkya, Kauṭilya and Nārada. Vaśiṣṭha, Kātyāyana and Vyāsa are in their favour.[1] Medhātithi explains that *śrotriyas* are those who are always engaged in *vedic* study or performance of religious rites and thus they should not be called as witnesses for the reason that giving evidence is prejudicial to such rites.[2] Kullūka also says that they are always busy with their studies and performance of sacrifices and so it is not proper to disturb them by calling them to courts.[3] Their exclusion seems to lie after all in their entire renunciation of earthly interests which makes them disqualified to appear as witnesses in a court of justice. Medhātithi very emphatically says that the prohibitory injunction does not insinuate anything against their credibility; they are perfectly honest and reliable and so their evidence has rather the force of establishing any fact to which they may speak. What is denied therefore, he continues to say, is not their trustworthiness but the propriety of their appearing as witnesses as in the case of the king.[4] Raghunandana makes the point clear. He says: "The king and the judges may not ask the *śrotriyas* any question for fear of being cursed on account of appointing them to do such a trifling thing as giving evidence and moreover they are always busy with their sacrifices and *vedic* studies and thus may forget things in connection with other people. So no useful purpose can be served by calling them as witnesses. But if they of their own accord agree to give evidence,

[1] Vas. XVI., उभौ तु श्रोत्रियौ साक्षी ।—Kātyāyana.

श्रोत्रिया न पराधीना: सूत्रयज्ञप्रवासिन: ।

युवान: साक्षिण: कार्या ऋणादिषु विजानता ॥—Vyāsa in Sc., p. 174.

[2] श्रोत्रियत्वं कर्मानुष्ठानोपलक्षणार्थं तेनानुष्ठानपरस्य तद्विरोधतया प्रतिषेध: ।

—Medh. on Manu VIII. 65.

[3] श्रोत्रियोऽध्ययनाग्निहोत्रादिकर्मव्यग्रतया न साक्षी ।—Kull.

[4] श्रोत्रियस्य तु साक्षित्वे कर्तव्यता प्रतिषिध्यते राजवन्न पुनरप्रत्ययितता न हि श्रोत्रियत्वं धार्मार्थं विरुद्धं जनयत्येव विशेषत: ।—Medh. on Manu VIII. 65.

they are always welcome to do so."[1] Thus it becomes clear that the *śrotriyas*, like the king, were privileged persons and their evidence was admitted if the privilege was not insisted upon. We may accept the views of Vaśiṣṭha, Kātyāyana and Vyāsa regarding the eligibility of the *śrotriyas* in this light. Devaṇabhaṭṭa explains, however, the word *śrotriya* as used by these authorities as merely 'a reciter of hymns.' The *śrotriyas* excluded by different authorities, according to him, are 'those who are always engaged in their sacrificial duties and thus dead to the worldly concerns.'[2] The exclusion of the *lingasthas*[3] (those in holy orders, *i.e.*, religious students) by Manu rests exactly on the same ground as that of the *śrotriyas*.

We find also *mahāpathika* (one engaged in a long journey) and *samudravaṇik* (sea-trader) among the incompetent witnesses.[4] The exclusion of these people is evidently based on the ground that the production of their evidence would be impossible or cause endless vexation, delay and expenses. The modern jurisprudence also does not deny the necessity for rejecting even the most legitimate evidence when it becomes evident that the liberty of adducing evidence which is conceded to every litigant has been so grossly abused as to stop the administration of justice.

It must be admitted that these exclusionary rules are highly artificial and can hardly be justified in actual practice. A strict observance of such rules certainly leads to the necessity of increasing the media of investigation and hampers justice to a great extent. The point to be noted, however,

[1] स्वीयवैदिककर्मकरणव्यग्रतया परकीये कार्ये विस्मरणसम्भवात् साक्षित्वलक्षकार्यनियोगतच्छापभयेन व्यवहारद्रष्टारोऽपि तत्र पृच्छन्तीति तत्साक्ष्यकरणानर्थक्याच्च न ते साक्षिणः कर्तव्याः। किन्तु अकृताः स्वयं साक्षिणो भवन्त्येव।—Vt., pp. 31-32.

[2] श्रोत्रियाः श्रुतिपाठकाः ··· एवमुक्तविधा न जातु कूटतां प्रतिपद्यन्ते। श्रोत्रियोऽत्र कर्मानुष्ठाननिष्ठो विवक्षितः। न पुनः श्रुतिपाठकः तस्य साक्षित्वेनोक्तत्वात्।—Sc., p. 178.

[3] Manu VIII. 65.

[4] Nār. IV. 179.

is that the principle of repudiation was mainly confined to the pre-appointed and not to the casual evidence. Manu says, " in all cases of violence, of theft and adultery, of defamation and assault, the judge must not examine the competence of of witnesses too strictly."[1] This view is strongly supported by Kātyāyana, Viṣṇu and Nārada.[2] It is justly observed by the Vivādārṇavasetu that offences like theft, adultery, etc., are committed in secret and thus in cases like these witnesses are available only by chance and hence there should not be any strict investigation as to their competency or otherwise.[3] Kauṭilya disqualifies enemies, co-partners (accomplices) and wife's brothers even in such circumstances.[4] Nārada also puts a limitation upon the rule just spoken of by saying that even in such cases infants, women, a single witness, a forger, a friend and an enemy must not be allowed to give evidence.[5] Uśanā is not for rejecting any person in criminal cases of the above description whether he be blind, deaf or a slave, a leper, a woman, an infant or an aged man, provided he is not interested as a party to the suit or in the event of it.[6] Medhātithi's idea also is that any man may be examined as a witness in cases of emergency where it is not possible to pre-constitute evidence but it requires to be seen that he is not untrustworthy on account of the presence of love, hatred, malice or avarice in him and further that he is possessed of understanding.[7] It

[1] VIII. 72.

[2] साहसात्ययिके चैव परीक्षा कुत्रचित् स्मृता ।—Kāt. in Sc., p. 183, Viṣ. VIII. 7 ; Nār. IV. pp. 188-89.

[3] निश्चयेनैव क्रियमाणत्वाद्वादिव परं साक्षिणो भवन्तीति कृत्वा न साक्षिणां परीक्षेत्युक्तम् ।
—Vi.-setu, p. 120.

[4] Kau. III. 11. 63. [5] Nār. IV. 190.

[6] दासोऽन्धो बधिरः कुष्ठी स्त्रीबालस्थविरादयः ।
एतेऽप्यनभिसम्बन्धाः साहसे साक्षिणो मताः ॥—Sc., p. 182 ; Vīram., p. 161.
अनभिसम्बन्धा विवादगोचरीभूतार्थसम्बन्धिनः ।—Vīram., p. 161.

[7] Medh. on Manu VIII, pp. 71-72.

becomes clear on the whole that our law-givers and jurists were fully aware that a demand for witnesses of more than ordinary intelligence, knowledge and credibility was possible only in cases where the parties had the power to select their own witnesses and that if it was pressed even in cases where the parties had not this power and where a certain fact had been witnessed incidentally only by persons not competent to be witnesses in the eye of the law, then it would amount to the exclusion of all attainable evidence on the question in dispute and thus to the frustration of justice. We know further from a text of Vyāsa and the observations made on it by Devaṇabhaṭṭa that even in civil suits the principle of exclusion was observed only when qualified witnesses could be had in abundance ; but in the absence of such witnesses, those who were not excluded by express injunctions could be allowed to depose though they did not possess the requisite qualifications of a witness. The text of Vyāsa runs thus : When a man is known as not tainted by any defect (though he is not otherwise qualified, *i.e.*, though he is not a householder, a native of the place or endowed with learning, etc.) he cannot be rejected.[1]

The modern legislation does not presume incompetency in a witness. Its tendency has been 'rather to allow a witness to make his statement, leaving its truth to be ascertained by the tribunal than to reject his testimony altogether. Competency thus becomes the rule, and incompetency the exception ; and incompetency is reduced within a narrow compass. Proceeding on this principle, the Evidence Act declares all persons to be competent witnesses except such as are wanting in intellectual capacity. Granted this capacity all persons become admissible as witnesses it being left to the court to attach to their evidence that amount of credence which it appears to deserve from their

[1] न खलदोषदुष्टानां व्यभिचारोऽस्ति साक्षिणाम् ॥

एवञ्च लक्षणान्वितसाक्षिणामलाभे प्रतिषेधराहित्यमात्रशालिनां साक्षित्वमित्यनुसन्धेयम् ।—

Sa., p. 181.

demeanour, deportment under cross examination, motives to speak or hide the truth, means of knowledge, powers of memory and other tests by which the value of their statements can be ascertained if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. Thus the question of competency has now been converted into one of credibility and neither want of religion nor physical defect not involving intellectual incapacity nor interest arising from the fact that a witness is a party to the record, or wife or husband of such party or otherwise, nor the fact that the witness is an accomplice in the commission of a crime form any ground for the exclusion of testimony.[1]

Competency and Compellability.

A very important point to note is that according to our ancient law-givers all persons competent to act as witnesses were compellable to do so and thus competency and compellability were intended to be co-extensive. Witnesses were compellable not only to undertake to give evidence, to come to the court and to be sworn but to answer all questions that might be put to them after they had been sworn. Kauṭilya says, "parties shall themselves produce witnesses who are not far removed either by time or place ; witnesses who are far removed either by time or place, witnesses who are very far or who will not stir out shall be made to present themselves by the order of the judges."[2] The means to enforce the attendance of witnesses was to inflict punishment either corporal or in the shape of fines, or render them liable to civil action for damages in case of their refusal to give evidence and consequent

[1] Woodroffe and Ameer Ali, p. 842.

[2] देशकालविदूरस्थान् साक्षिणः प्रतिपादयेत् ।
दूरस्थानप्रसारान् वा स्वानिवाक्येन साधयेत् ॥—Kau. III. 11. 63.

non-attendance. Thus Yājñavalkya tells us that a man who knowing all refuses to give evidence should be punished like a false witness.[1] Again 'if any person does not answer questions about a loan, he must be compelled by the king to pay all (both the capital and interest) on the forty-sixth day and the king shall take the tenth part of the money realised.'[2] Similar injunctions are found in Manu and Bṛhaspati as well. According to Manu a man who without being ill does not give evidence and answer questions in cases of loans and the like (*ṛṇādiṣu*) within three fortnights (after the summons) shall become responsible for the whole debt and pay a tenth part of the whole (as a fine to the king).[3] Bṛhaspati says that a witness who being summoned to give evidence does not come to the court though he is not ill shall have to pay the whole amount of the debt and a fine after three fortnights.[4] Kātyāyana also says that if a witness refuses to give evidence he will have to pay the whole debt with a fine and in cases other than those of debt he will have to pay a fine of three hundred coins.[5] Medhātithi aptly remarks that the expression *ādi* in *ṛṇādiṣu* in Manu's text sufficiently indicates that what is stated there applies to cases of every description and not only to cases of debt. He further expresses the opinion that the punishment of a witness for refusing to give evidence should consist simply in his being liable to bear the burden of the defeated party.[6]

[1] Yāj. II. 79.

[2] Yāj. II. 78.

[3] Manu VIII. 107.

[4] आहूतो यस्तु नागच्छेत् साक्षी रोगविवर्जितः।
ऋणे दमं च दाप्यः स्यात् विपक्षात् परतस्तु सः ॥—Sc, p. 212.

[5] साक्षी साक्ष्यं न चेद् ब्रूयात् स सदस्यं चतुःशतम्।
अतोऽन्येषु विवादेषु विंशतं दण्डमर्हति ॥—Pds., p. 115.

[6] ऋणादिष्वित्यादियहणेन सर्वव्यवहारोपक्रमः। यस्मिन् व्यवहारे साक्ष्यमियत्तं कालं भवति पराजीयमानस्य वाधे स साक्षिणो वादमित्युक्तं भवति।—Medh. on Manu VIII. 107. (See Dr. Jha's translation also.)

Thus the remark 'that the duty of citizens to appear before a court of justice and testify to such facts which they know and which may be necessary for the due administration of justice is one which has been recognised and enforced from an early period, and every court having definite power to try cases could call for adequate proofs of the facts in controversy and to that end to summon and compel the attendance of witnesses' applies to India as well.[1] Kauṭilya further tells us that the witnesses were entitled to their "reasonable costs and charges" and that these costs had to be paid by the defeated party.[2] It would be interesting to note that the modern law on the subject is not at all different. It is laid down that 'a person who without just cause absents himself from a trial at which he has been duly summoned to attend as a witness, or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt.' The following imaginary case has been put in illustration of this rule. 'Were the Prince of Wales, the Archbishop of Canterbury and the Lord High Chancellor to be passing in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a half-penny worth of apples, and the chimney-sweeper and the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? "No most certainly not." An exception exists in the case of the Sovereign, against whom, of course, no compulsory process of any kind can be used.'[3]

Parties to the Suit—if eligible to give evidence.

We do not definitely know whether the Hindu Law of Evidence permitted the parties to the suit to give evidence.

[1] See Woodroffe and Ameer Ali, p. 885.

[2] पुरुषवृत्तिरिष्टाङ्गः। पथिभक्तमर्थविशेषतः। तद्भयं नियम्यो दद्यात् ॥—III. 1. 58.

[3] Best on Evidence, p. 115.

As a matter of fact all legal treatises are silent on this point. It has, however, just been seen that incompetency from interest is an accepted principle of the Hindu law of evidence.[1] Thus when the evidence of a person, though indirectly interested, was not to be received in apprehension that interest or bias might taint his testimony with falsehood or misrepresentation, it is only reasonable to suppose that persons having a direct interest in the suit as parties either in the event of it or in the matter in question, were, as a matter of course, deemed incompetent to testify on the ground that such persons were not likely to tell the truth to their own disadvantage. That both the parties are interested when the case is a civil one is obvious. In criminal proceedings also both the parties have their respective interests. The chief interest of the prosecutor is to see the party by whom he has been injured duly punished. Besides this he had some special interest also under the Hindu law. We know from the Viṣṇusmṛti that the prosecutor became entitled to particular benefits and advantages upon obtaining a conviction of the accused person, such as the expenses of cure in cases of assault and a restitution of the property stolen in cases of theft.[2] About the interest of the party charged with a crime hardly anything need be said. His life and honour depend upon the result of the criminal trial against him. So if he is admitted as a witness to give evidence on his own behalf he will not only be on his guard not to make any self-harming statement but will devise all kinds of untruth also to prove that he has not taken any part in the commission of the crime with which he has been charged. The rules regarding the 'burden of proof' also indicate that an accused person was not generally allowed to be examined as a witness on his own behalf. We have seen that when a man brings a charge against another and when the latter denies it, the former is the party

[1] Chapter on the 'Competency and Incompetency of Witnesses.'

[2] Viṣ. V. 75 and 89.

to be put on proof for the reason that he states an affirmative. So the onus of proving the guilt of the accused being upon the accuser, the former was not at all required to prove or disprove anything. In short though there is no definite rule in our books on the subject of the competency of the parties to give evidence, yet it can be said almost to a certainty that the practice of admitting them as witnesses was not much in vogue and looked upon with favour in ancient Indian law. It may be noted here that the English rule on the subject was not at all dissimilar even in the middle part of the nineteenth century and that the removal of restrictions on the admissibility of the evidence of the parties is the result of a number of enactments passed on different occasions between 1844 and 1898.

So far as can be gathered from the Arthaśāstra, an inquisitorial principle seems, however, to have been recognised. For we find Kauṭilya in favour of subjecting the accused in cases of theft to a series of interrogations about the 'nature of the work he did during the day previous to the theft and the place where he spent the night till he was caught hold of.'[1] According to him further a suspected person will not generally be arrested three days after the commission of the crime on the ground that *interrogations that may be put* to him will not be of much use because he may not then be able to account for his movements apparently owing to forgetfulness.[2] Kauṭilya continues to say that a satisfactory explanation of the criminating circumstances will be regarded as a proof of his innocence and a non-explanation of the same will tell strongly against him.[3] Kauṭilya evidently does not believe in the presumption of innocence for the accused and assumes his criminality.

[1] ततः पूर्वस्याह्नः प्रचारं रात्रौ निवासञ्च चारयेदादितः अनुयुञ्जीत ।—IV. 8.

[2] विराधादूर्ध्वं मयाप्तः शङ्कितकः पृच्छाभावादन्यत्रोपकरणदर्शनात् ।—IV. 8.
पृच्छाभावाद् विस्मृतिसम्भवेन प्रश्नायोगात् ।—Ganapati.

[3] तस्यावसारप्रतिसन्धानं शुद्धः स्यादन्यथा कर्मप्राप्तः ।—IV. 8.
कर्मप्राप्तः कृतापराधः ।—Ganapati.

A vivid picture of the way in which interrogation of the accused was conducted in ancient India is presented by the trial of Cārudatta in the famous drama Mṛcchakaṭika. Cārudatta was charged with the murder of Vasantasenā, his mistress, and when brought to the court was asked several questions to which he could not give satisfactory answers. This was taken as an additional proof of his guilt and he was convicted.[1]

Though the special interrogation of the accused is undoubtedly a moral torture to him it was intended to be applied with a view to getting at the truth of the matters in question before the tribunal which would otherwise remain undiscovered. It must be admitted that the discovery of truth may be much promoted by questioning the accused and eliciting answers from him because he knows best whether he is guilty or innocent. Considered in this light the practice may be said to have its value. But what may be urged against it is that 'it assumes the guilt of the accused before proof, makes the judge enter into an intellectual fight with him on that hypothesis, impairs his impartiality and thus detracts from the moral weight of the condemnation of the accused however guilty he is.' It deserves to be noted that these are some of the considerations which are responsible for the abolition of the practice which prevailed in the mediaeval tribunals of the civil and canon laws and survives with all its rigours in many continental tribunals even at the present day.

Kauṭilya seems to recommend also the practice of torturing suspected persons physically with a view to compelling confessions and extracting truth from them. We find him prescribing *karma* for a suspected person who cannot explain his movements consistently with his innocence as well as for those whose guilt is believed to be true.[2] He gives also a list of various kinds of *karma* and specifies people who are to be

[1] Act IX.

[2] अन्यथा कर्मप्राप्तः ··· यावदोषं कर्म कारयेत् ।—IV. 8.

subjected to them and to whom they are not to be applied.[1] *Karma* means *kṛcchravyāpāra* and *tāḍana* according to Gaṇapati Sāstri[2] and has been rightly rendered by R. Shāmaśāstrī as 'tortures.' That the practice is most disgraceful and cruel cannot be denied. It may, however, be pointed out that it was so long dominant on the continent and though never legalised in England was frequently adopted there by authority of Royal Warrant between 1557 and 1640.

A word about false confessions. Kauṭilya mentions the case of Māṇḍavya who made self-criminative statement. The great sage, though quite innocent, admitted himself guilty of the offence of theft being alarmed at the circumstantial evidence against him and with a view to escaping torture as the result of which he was convicted.[3] It is not too much to say that his conviction proceeded chiefly on his confession. What Kauṭilya means to say is that 'justice will suffer if the confession of an accused person is made the sole basis of his conviction, because sometimes confessions, though indisputably false, are made and it is not always possible to ascertain the motive which has led to them.' There cannot be any question about the soundness of the principle underlying this idea and it works in the most advanced system of modern jurisprudence as well.

Examination of Witnesses.

According to Manu witnesses are to be examined in the forenoon in the presence of Brāhmaṇas and images of gods; they will have to be purified and to face the north or the east.[4] Vasiṣṭha lays down that witnesses will have to take oath before they are examined and answer questions facing the east and

[1] न त्वेव खिद्यं ··· —IV. 8.

[2] Arthaśāstra (Gaṇapati's edition), pp. 156-157.

[3] Kauṭilya, IV. 8.

[4] VIII. 87.

touching such things as gold, cow-dung, *dūrvā*-grass, etc.[1] Viṣṇu enjoins that the judge should summon the witnesses at the time of sunrise and examine them after having bound them by an oath.[2] The taking of oath and all other formalities were apparently intended to fill the minds of the witnesses with a solemn awe and fear of spiritual punishment in case the evidence given by them be false. The texts of Manu, Kātyāyana and Nārada show that witnesses had to be examined in the *saṁsad* or *sabhā* which was nothing but the judicial assembly or court of modern days.[3] Kātyāyana says that witnesses are to depose in the *sabhā* and nowhere else.[4] Now we know from some *smṛti* texts that besides the members of the assembly other persons were also allowed to be present there or in other words that the court was open to all persons.[5] From all these it appears that our law-givers fully realised that highly beneficial results could be obtained from taking evidence in public. The advantages of the publicity of judicial proceedings cannot be overestimated and are recognised by modern systems of jurisprudence as well. It is rightly thought that 'publicity of the examination or deposition operates as a check upon mendacity and incorrectness.' We may read the following observation with interest. "Environed as he (the witness) sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from

[1] Sc., p. 206.

[2] VIII. 19. According to Āpastamba 'a witness is to be examined before kindled fire, standing near a jar full of water, in the presence of the king and with the consent of both parties and of the assessors.'

II. 11. 29. 7.

[3] सभान्तः साक्षिणः सर्वान्—Kāt. (Mit. on Yāj. II. 73)., Manu VIII. 79, Nār. Appendix 10. S. B. E. (Vol. XXXIII), p. 224.

[4] सभान्तर्यैव वक्तव्यं साक्ष्यं नान्यत्र साक्षिभिः—Pd., p. 112.

[5] Sc., pp. 30-32 ; Ancient Hindu Judicature, p. 3.

अत्र राजसभाव्यवहारकाले लोकाचारजन्यपक्षाश्रयस्थिता बहवो लोका वादिप्रतिवादिभ्यां सह धर्माधिकरणमागच्छन्ति ।—Asahāya on Nār. III.

a thousand tongues ; many a known face and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress may, through some unsuspected channel, burst forth to his confusion.''[1] Manu, Yājñavalkya and Kātyāyana lay down that witnesses are to give their evidence in the presence of the plaintiff and of the defendant.[2] The utility of this rule lay in the fact that the parties for whom and against whom they spoke could easily detect any deviation of truth in them and ask them such questions as would serve their purpose.

The thing in dispute was also to be kept in view of the witnesses at the time of their examination. In cases relating to immovable property the court had to shift near it and when movables formed the subject-matter of the suit they had to be brought to the court.[3] A text of Kātyāyana has been interpreted by the Vīramitrodaya as indicating the essentiality of the thing in dispute being placed before witnesses. The text declares that the examination of witnesses may even take place in the absence of the parties but not in the absence of the thing in dispute.[4] The law extends this principle to cases of murder by requiring that the examination of witnesses should take place before the dead body.[5] It is further provided that when the dead body cannot be found the things indicating the commission of the crime should be put before the witnesses.[6] This has a resemblance to the modern law of evidence according to which the things in connection with the commission of a crime are produced before the court as exhibits.

[1] Best on Evidence, p. 88.

[2] Manu VIII. 79 ; Yāj. II. 73 ; सभाम्यः साक्षिणः प्राप्तानार्थिप्रत्यर्थिसन्निधौ—
Kāt. (Mit. on Yāj. II. 73).

[3] Viram., p. 167, Sc., p. 206.

[4] Viram., p. 167.

[5] वधे तु प्राणिनां साक्षी वादयेत् शवसन्निधौ—(Kāt.), Viram., p. 168 ; शिवसन्निधौ is another reading.

[6] तदभावे तु चिह्नस्य ···। चिह्नस्य वधचिह्नस्य।—Viram., p. 168.

There are, however, certain exceptions to the general rule. We know from a text of Kātyāyana that when things in dispute are such as can be weighed (such as gold), counted (such as coins) and measured (such as grains—*godhūma*, paddy and the like), witnesses may be examined in their absence also.[1]

Another very important principle recognised by the Hindu law of evidence is that witnesses are to be examined each separately (*pṛthak pṛthak*). Nārada and Kātyāyana are our authorities on the point.[2] They do not state, however, if witnesses are to give their evidence without the hearing of each other also. Gopāladāsa Siddhāntavāgīśa, a comparatively recent writer on Hindu law, expresses the opinion that the expression *prthak prthak* in the texts of Nārada and Kātyāyana implies that witnesses are to be examined without each other's hearing.[3] The usefulness of the practice seems to have been recognised, however, at a much earlier period. For we have definite texts from Vasiṣṭha declaring that if a certain fact has been witnessed by some persons assembled together, they are to depose also in that manner, *i.e.*, being assembled; if they have witnessed it separately, then only evidence should be given by them separately; if the fact has been seen by different persons at different times, then they are to give evidence one by one and in different times, *i.e.*, out of the hearing of each other.[4] Evidently this text-writer realises that combination of witnesses in certain cases should not be allowed on the obvious ground that the evidence of one witness may exercise dangerous influence over others. Gautama's rule on the subject should also be noticed in this connection. It is to the effect that witnesses shall not speak if they are examined singly.[5] The Vīramitrodaya holds, on the authority of the texts of Vasiṣṭha just referred to,

[1] Viram., p. 168.

[2] Nār. IV. 198; see also Mit. on Yāj. II. 73.

[3] पृथक् पृथगिति परस्परासाचात् ।—(Vyavahārāloka).

[4] May, p. 26, Sc., p. 208.

[5] Gau. XIII. 5.

that this rule is to apply when there are many witnesses at a time to a fact.[1] The rule that witnesses should be examined all at a time refers to the practice which must have prevailed in ancient time of confronting witnesses who might have seen or heard a fact being assembled. The adoption of this practice is not peculiar to the Hindu system of jurisprudence. Taylor's observations on the point are so illuminating that we do not make any excuse for quoting them. "In former times when the evidence of witnesses called on opposite sides was directly conflicting, the court would often direct that the witnesses should be confronted; and on one remarkable occasion, no less than four witnesses were for this purpose placed together in the box. This practice which is still recognised in the Ecclesiastical Courts and Court of Probate, and which still prevails largely in the County Courts, where it is productive to highly useful results, has, for some unexplained reason grown into comparative disuse at Nisi Prius. This is to be regretted, for the practice certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth." [2]

A verse quoted by the Mitākṣarā enjoins that witnesses are not to be asked the same question again and again.[3] The intention of the rule is obviously to protect a witness from the vexation of being compelled to answer a question which though substantially answered has been repeated to him to see if something new suited to the purpose of the questioner can be extorted from the witness. This verse further declares that what a witness says quite naturally is to be accepted in evidence. We have a verse of Manu also which expresses exactly the same view. According to it 'what the

[1] ... तदपि वसिष्ठोक्तसमवेतसाक्ष्याविषयम्—Viram., p. 169.
[2] Goodeve on Evidence, p. 69.
[3] Mit. on Yāj. II. 79.

witnesses declare quite spontaneously, *i.e.*, without being influenced by any motive or consideration, should be received in trials.' [1] Medhātithi expounds the law thus : it should be ascertained what part of the evidence given by a witness is out of some consideration such as acquiring religious merits by not being a cause of suffering to anybody and what part is in accordance with what he actually saw or heard. The part of evidence which appears to be delivered out of some consideration should be rejected and the rest accepted. The great commentator illustrates also the point by giving an example : suppose a certain man accuses another with having insulted him and the accused denying the charge, a witness is called to testify to the fact. The witness says ' it is true that the accused has insulted the complainant, but it has been done in joke and not in malice.' [2] Now the point to be considered is that the accused does not found his defence on having said or done something in joke which the complainant has taken upon himself as insult and as such it is just possible that the evidence of the witness is not quite natural but due to the consideration that by stating the facts exactly as they happened he may incur the sin of causing hardship to a fellow being. Medhātithi's idea evidently is that the right course to be followed in such a case is that the evidence of witnesses which strictly relates to the fact in issue should be accepted and all qualifying statements going beyond the defence taken by the accused and apparently emanating out of some motive or consideration rejected.

Medhātithi further sees in the expression *sāntvayan* (gently exhorting) occurring in verse 79 of Manu a prohibition against harshly questioning a witness.[3] He rightly thinks that the use of harsh words is a cause of intimidation and intimidation in its turn causes perplexity and failure of memory,[4] and thus if a witness

[1] Manu VIII. 78.

[2] Medh. on Manu VIII. 78. (See Dr. Jha's translation also.)

[3] सान्त्वयन्न परुषं ब्रुवन् ...

[4] वाक्पारुष्येण हि प्राङ्विवाकाद् विभ्यतोऽवक्तिरूपा न सर्वे स्मरेयुः संस्कारसंग्रहैतुत्वाद् भयस्य ...

becoming intimidated cannot remember all the particulars of a case to which he is to bear testimony, then the very purpose of calling him as a witness will be baffled.

We meet with some authoritative *smṛti* texts which seem to have a very special significance as to the Hindu law of Evidence. These texts clearly indicate that the character of the witnesses called in by a party could be questioned by the opposite party if it occurred to him that they had such a general reputation for untruthfulness or moral turpitude that they were unworthy of credit. They also go to prove that the ancient Hindu law-givers made sufficient provision for the protection of witnesses against their reputation being injured by false allegations regarding their character. These texts are rendered below for ready reference :—

"The faults of the witnesses of either party are to be mentioned by the opposite party. They are to be mentioned one by one in a written petition." [1] "If the allegations against certain witnesses are substantiated these witnesses are to be sent away. Otherwise the party who makes these allegations is to be punished with fine." [2] "The adverse party may bring the charge of bad character and other faults where such faults exist. But if he alleges faults against a faultless witness, he is to be punished with a fine equal to the amount in dispute." [3] Parāśara Dharmasaṁhitā [4] has the following note on these texts :—'Suppose the defendant mentions before the judges that the witnesses of the complainant are guilty of certain faults. The judges should thereupon ask them 'Do such faults really exist in you?' If they reply in the affirmative they should not be accepted as witnesses. If they deny the charge then those faults are to be proved by the defendant. If he fails to prove them then he will be punished according to the nature of the suit." A text of Kātyāyana further

[1] Bālaṁbhaṭṭi on Mit. ; Yāj. II. 72.
[2] Mit. on Yāj. II. 72.
[3] Bṛhaspati, Pds., p. 105.
[4] P. 105.

declares that faults of witnesses to be pointed out by the opposite party are those which are *gūḍha* (secret) and the faults which are *prakaṭa* (apparent) need not be pointed out by him but should be taken cognisance of by the judges themselves.[1] The faults of the former kind are evidently those which are not detectable by others such as interest in the result of the suit, friendship with the party in whose favour his testimony is given, addiction to vicious practices, want of moral character, etc. As to the nature of the latter kind of faults we should look to another text of Kātyāyana. From this text it appears that these faults consist of defects in witnesses which are quite apparent to the senses of the judges and other people.[2] Devaṇabhaṭṭa comments that it is quite useless for the opposite party to draw the notice of the tribunal to such defects apparently for the reason that they are too obvious.[3] We may assume that the defects just spoken of are nothing but those which are thought to be the *prima facie* causes of incompetency, such as leprosy, childhood, womanhood, perfect lunacy, a state of intoxication and the like.

The important point to be noted in the above discussion is that whenever it was allowable to call in question the character of a witness it was competent to the other party to contradict it and that any proof of his bad character or his having committed a crime greatly affected the admissibility of his evidence. This stands in strong contrast with the practice prevailing in the modern system of law under which every person offered as a witness is admitted to give evidence and incapacity from crime or bad character does not interfere with his admissibility, though as a matter of fact the evidence given by him in order to be acted upon requires strong corroboration, its credibility being thought to be much less than what it would otherwise have been.

We do not know for certain if the system of cross-examination

[1] Sc., pp. 191-192.
[2] May, p. 24.
[3] Sc., p. 193.

was in vogue in ancient times. Practically we do not get any clear reference to it. The word *vākyānuyoga*, however, occurs in Kauṭilya.[1] It has been rendered by R. Shāmaśāstrī as '*cross-examination*' and is to be employed in lieu of torture to elicit confessions in the case of a female accused. A *smṛti* text tells us of *vākyaparīkṣā* (examination of statements) and another of *vākyaśodhana* (clearing a statement of all errors),[2] but whether these were made by means of cross-examination, as we now understand it, is a matter of great doubt. Haradatta seems to suggest that the word *iti* in the injunction **सन्देहे लिङ्गतो दैवेनेति विचित्य** (Āpastamba II. 11-29-6) includes among other additional proofs, the *proof of cross-examination* as well.[3]

Weighing of Evidence.

We have some rules also as to what should be done in case of general conflict between the witnesses called in by either of the parties. Manu lays down that when there are discrepancies in the statements of several witnesses, the assertion of the majority must be received; if the number adhering to two conflicting statements be equal, then the statements of those distinguished by good qualities should be accepted, when there is conflict between equally distinguished witnesses, the evidence of the best among the twice-born (*dvijottama*) should be considered as true.[4] Medhātihi sees in the use of the expression *dvijottama* a reference to the special consideration to be paid to the evidence given by a person of superior caste. Thus he says 'when there is a conflict between the two equally qualified witnesses, preference is to be given to

[1] स्त्रिया वाक्यानुयोगो वा।—IV. 8.

[2] Mit. on Yāj II. 80.

[3] इति शब्दः प्रकारे। यद्वाक्यदैव युक्तं वचनव्याघातादि तेन च विचित्य सम्यक्स्थितिमन्विष्य निर्णेतारः स्युः इत्यध्याहृतेन वाक्यपरिसमाप्तिः।

[4] VIII. 73.

the deposition of the witness belonging to the higher caste.[1] This expression (*dvijottama*) corresponds to *kriyāvantaḥ* in Bṛhaspati's text in the opinion of Kullūka and Rāghava and means particularly distinguished Brāhmaṇas who fulfil their sacred duties. Bṛhaspati adds that when there is equality of such witnesses also then those who are purer in mind and deed should be relied on.[2] Yājñavalkya's text on the subject is identical with that of Manu with this variation that there the expression *guṇavattama* is substituted for *dvijottama*.[3] *Guṇavattama* is explained by the Mitākṣarā as a person possessing the requisite qualifications of a witness in the greatest number, such as one who is endowed with a knowledge of the Vedas, studies the Vedas, practises religious rites and ceremonies as enjoined in the Vedas, has children and wealth and so forth.[4] In the opinion of Kauṭilya also a consideration of the number of witnesses becomes most material when there is conflict of testimony. He says ' if witnesses differ, judgment may be given in accordance with the statements of a majority of pure and respectable witnesses or a mean of their statements may be followed.' [5] Nārada's method of disposing of contradictions is almost the same. According to him " when there is conflicting evidence, the plurality of witnesses decides the matter; if the number of witnesses is equal on both sides, the testimony of those must be accepted as correct who are of pure character. If the number of such witnesses is equal on both sides, the testimony of those must be accepted who are possessed of superior memory. When an equal number of witnesses possessed of good memory is found on both sides, the evidence of the witnesses is entirely valueless on account of the subtle nature of the law of evidence." [6]

[1] युक्तगुणवतां समगुणानां भेदे जातिरादर्तव्या ।—Medh. on Manu VIII. 73.

[2] Vm., p. 308 ; S. B. E. (Vol. XXXIII, p. 303). शुचिमत्तराः after all is not a very good reading.

[3] II. 78.

[4] ये गुणवत्तमाः श्रुताध्ययनतदर्थानुष्ठानधनपुत्रादिगुणसम्पन्नाः—Mit. on Yāj. II. 78.

[5] साक्षिभेदे यतो बहवः शुचयो नुमता वा ततो निगच्छेयुः मध्यं वा गच्छेयुः—Kau. III. 11.

[6] IV, pp. 229-230.

Another *smṛti* text also declares that in the matter of conflicting testimony the decision should be arrived at by the difference in number or in quality aming the witnesses; when the witnesses are equal in all respects, they will not prove anything.[1]

Authorities thus agree that in cases of contradiction between two sets of witnesses, the evidence of that set is to decide the suit which has any point of distinction either in number or in quality in its favour and when these two sets are equal in all respects and thus when distinction cannot be made between them, then their evidence will be deemed incapable of influencing the decision of the suit. Asahāya remarks that in such a case the rule that witnesses become incompetent because they do not agree with one another will apply (Nārada, IV. 160).[2]

All these observations, *viz.*, that in cases of discrepancies the statements of the majority should be accepted, etc., will appear to be at variance with the rule contained in the following verse of Kātyāyana :

साक्षिणां लिखितानान्तु निर्दिष्टानां च वादिना ।
तेषामेकोऽन्यथावादी भेदात् सर्वे न साक्षिणः ॥[3]

This verse apparently tells us that ' of the witnesses recorded and called by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction.' Jīmūtavāhana says that the real significance of the text of Kātyāyana is otherwise and hence there is no inconsistency : the text implies that the evidence of each of the two sets of witnesses is to be rejected also when there is a majority on one side by a single person only.[4] Jīmutavāhana explains the position thus : suppose of the three witnesses called in by a party one bears testimony to a certain fact, another directly contradicts him and the third either supports

[1] Sc., p. 189.
[2] Asahāya on Nār. IV. 230.
[3] Vm., p. 325 ; Sc., p. 189.
[4] तेन साक्षिवचनभेदे यदेकोऽधिकः स्यात् तव भेदादसाक्षित्वमिति वर्णनीयम्—Vm., p. 326.

one of them or says something quite new. Now it is evident that the evidence of the first witness is counterbalanced by that of the second and thus the third man is practically reduced to the position of a single witness, and as a single witness is generally to be rejected, there cannot be any proof at all by witnesses.[1] If the number of witnesses be five instead of three, and if four agree with one another and one only goes against them, then the evidence of the majority will, of course, prevail, for the reason that there is a majority of three persons. But if the proportion be three and two, the case will not be decided by the evidence of the majority, because here also the evidence of two persons will be counterbalanced by that of the other two and as such the one who forms the majority will be a single witness.[2] Vācaspatimiśra and Mitramiśra (author of a commentary on Yājñavalkya *smṛti* as well) take the same view of the text of Kātyāyana. They both say that if there are three witnesses and if two of them are antinomically related by differing from each other, and thus making it difficult to know which of them is a false witness, the evidence of the third witness will be deemed ineffective.[3] Evidently *eka* in reference to whom *anyathāvāda* is regarded as a strong ground for the rejection of the evidence of all refers to the single person who forms the majority and *anyathāvāda* means contradiction in relation to the statement of the minority.

From what has been said it is clear that the texts quoted above want to substitute arithmetic for reasoning and observation in estimating the value of evidence. The unsoundness of such a principle is obvious. Vijñāneśvara notes it and expresses the

[1] & [2] Vm., p. 326.

[3] तयाणां साक्षिणां मध्ये एकस्यान्यथावादेऽपरस्य तत्तुल्यस्य सत्प्रतिपक्षितया तृतीयस्य चैकतया तच्च साक्षिणा न निर्णयः।—Vācas.

तत्र त्रयाणां ··· एकस्यान्यथावादे ऽपरस्य सत्प्रतिपक्षितया तृतीयस्य किञ्चिदवादित्वे तच्च भेदात साक्षिभ्यो न निर्णयः।—Mitramiśra on Yāj. II. 78.

opinion that quality must prevail over number. He points out that the superiority of good qualities has been recognised even by Yājñavalkya and says that where respectable witnesses are few and others are many, the evidence of the former should be taken as outweighing that of the latter.[1]

Demeanour—A Test of Credibility.

The Hindu law-givers think that the personal credibility of a witness can best be ascertained by his demeanour while under examination. According to Manu the internal disposition of suitors and witnesses should be discovered by external signs—by change of voice, by change of complexion and by change of aspect in the shape of perspiration, trembling, thrilling of hairs, etc., by eyes and by gestures such as the movements of hands, eyebrows and so forth.[2] Manu observes further in support of his statement that even in ordinary life the innermost heart is indicated by means of the variations of aspects, gait and speech and by changes in the eye and of the face.[3] Yājñavalkya, Viṣṇu and Nārada are also of opinion that a consideration of miens and gestures becomes most material in determining the veracity or otherwise of a witness.[4] When a witness undergoes changes whether mental or physical, in speech or in act he is to be deemed dishonest. Thus according to them, walking irresolutely and without any reason, licking the corners of the mouth, drawing repeated sighs, scratching ground with the feet, shaking the arms and clothes, continuous change of colour in the countenance, dryness of throat and of lips, stammering, making contradictory statements, making long speeches which are not to the purpose and without being asked, not giving a direct answer and not looking a man full in the face on being looked at—all these must be regarded as obvious marks

[1] Mit. on Yāj. II. 78.
[2] Manu VIII. 25.
[3] Manu VIII. 26.
[4] Yāj. II. 13-15 ; Nār. IV. 193-196 ; Viṣ. VIII. 18.

of insincerity. Medhātithi says, however, that these statements must be taken with some qualification. His view is that the demeanour of a witness consisting in confusion, embarrassment, contradiction, irrelevant speeches, or distraction of mind must not be taken as a sure proof of dishonesty in him, for the simple reason that these changes may arise from other causes as well. Thus, he says, in many cases persons who are not used to the presence of great men become flurried even though they be quite truthful: while those that are expert manage to hide their real feelings.[1] Vijñāneśvara expresses the opinion that such changes may establish a mere probability and not certainty of falsehood, because it is difficult to distinguish between changes that are spontaneous and those having some cause. If any man be intelligent enough to mark the distinction, even then defeat of the party producing the witness will not ensue, *i.e.*, there would be no justification for totally disbelieving such a witness.[2] He concludes by saying 'as people do not perform funeral ceremonies on the appearance of the probability of a person's dying, so in these instances although it should appear probable that a person will be defeated, still it is not the proximate cause of defeat.'[3]

In modern times also the weight due to the testimony of a witness is to a great extent determined by the deportment and manner in which he delivers it. Though it is thought that 'the manner and deportment is undoubtedly indicative of the existence or absence of sincerity,' yet 'it is recognised at the same time that a proper observation of it requires the most skilled and judicious discernment.' The remarks of a modern writer is so instructive on the subject that we cannot resist the temptation of quoting them *verbatim*. "A witness may be very honest, although his demeanour is, in some respects, open to censure and deserves

[1] Medh. on Manu VIII. 25.

[2] एतच्च दोषसम्भावनामात्रमुच्यते—Mit. on Yāj. II. 13-15.

[3] नहि मरिष्यतो लिङ्गदर्शनेन मृतकार्यं कुर्वन्ति। एवमस्य पराजयो भविष्यतीति लिङ्गदर्शनेऽपि न पराजयनिमित्तकार्यप्रसंगः।—Mit. on Yāj. II. 13-15.

rebuke. Constitution of mind, habit, manner of life, may give him a coarse blunt tongue and a manner in appearance, yet not meant to be uncivil or disrespectful. Such a rough, unrefined nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood and a wish and determination to give true evidence. Demeanour consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness or timidity. . . . It may not be good behaviour in a witness to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him, and the distraction of mind occasioned by that employment of his eyes may well cause him, on returning to his duty, to answer hastily and without consideration. But in all this there may be no intentional disrespect to the court; and the witness notwithstanding may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another, making the sense very different from what was intended; unconsciously we say what we did not mean to say. In like manner a witness may inadvertently contradict himself."[1]

In the case of a single witness not contradicting himself the means of detecting perjury, according to the Smṛticandrikā [2] is to follow the principle embodied in the following verse of Manu:

यस्य दृश्येत सप्ताहादुक्तवाक्यस्य साक्षिणः।
रोगोऽग्निर्ज्ञातिमरणमृणं दाप्यो दमं च सः॥ [3]

"When a witness is found to suffer from sickness, fire or the death of a relative on any one of the seven days after he has given evidence, he should be made to pay the debt and a fine." Ac-

[1] Best, on Evidence, p. 13.
[2] P. 219.
[3] VIII. 108.

cording to Medhātithi illness stands for any kind of acute suffering, fire for the burning of cattle and conveyances, and death of a relative for the death of the son or the wife or some other near relative.[1] Medhātithi's idea evidently is that any terrible calamity happening to the witness from the king or God will be a sufficient indication that he has been adjudged by destiny as a perjuror. This test will apply, Smṛticandrikā adds, to such single witnesses as the messenger, the accountant, the agent, etc. It will not apply, however, in the case of the king, the judge or one truly virtuous and endowed with the requisite qualifications of a witness, because falsehood cannot be expected in these persons though they depose singly.[2] The Smṛticandrikā quotes also the authority of Vyāsa to show that even the test of ordeal may sometimes fail owing to wrong administration but never a good witness.[3]

Evidence is to be confined to the Subject-matter.

From a text of Nārada it appears that the utility of the principle that the evidence given by a witness is to be relevant to the subject-matter of the suit was recognised by our law even at a very early period. We quote the text below :

निर्दिष्टेष्वर्थजातेषु साक्षी चेत् साक्ष्य आगते ।
न ब्रूयादक्षरसमं न तन्निगदितं भवेत् ॥[4]

' Issues being settled, if a witness at the time of giving testimony does not make statements having relevancy to the *akṣara*, his evidence will be regarded as ungiven.' *Akṣara* means ' contents of the plaint ' as is evident from a text of Bṛhaspati in which he says that the answer of the defendant at the second stage of the

[1] Medh. on Manu VIII. 108.

[2] Sc., p. 219.

[3] मन्त्रिमन्त्रौषधिबलात् प्रदत्तं चाविधानतः ।
विसंवदेद्द्विव्यमपि न तु साक्षी गुणान्वितः ॥—Sc., p. 219.

[4] Nār. IV. 232.

trial is to be consistent with the *akṣara* of the plaintiff.[1] Medhātithi in commenting on a verse of Manu (VIII. 80) says that at the time of questioning a witness the judge should mention particularly the subject-matter in dispute in detail and direct him to say all he knows about it; because until a witness hears of the details he cannot be expected to understand the question properly.[2] The Smṛticandrikā takes the term *akṣara* as occurring in Nārada's text in the sense of the substance of the questions put to a witness and says that if a witness does not confine himself to such questions in his answer and goes beyond them, his evidence will be regarded worthless.[3] If we look to the rules for pleading we shall see that they have a material bearing on the necessity and usefulness of adopting the principle enunciated by Nārada. We know from Yājñavalkya and other Smṛti writers that after the stage of *avedana* (first representation) is over, or, in other words, after the complaint has been lodged and after the court being convinced that there is a cause of action has summoned the defendant and made him appear before it, the plaintiff is to write the *bhāṣā* (proper declaration of complaint) in the presence of the defendant and the defendant also in his turn is to put in the *uttara* (answer or defence) in the presence of the plaintiff.[4] It is also laid down that the declaration should be ' significant, technically precise, comprehensive, not unmeaning or unsusceptible of proof and not at variance with possibility; '[5] the answer also ' should meet the grounds raised by the complainant, be substantial, clear, consistent, free from prolixity and not obscure.'[6] Thus we see that the pleadings

[1] एककालं समानीते प्रत्यर्थी सभ्यसन्निधौ।
पूर्वपक्षाक्षरसमं लेखयेदुत्तरं ततः॥—Sc., p. 96.

[2] ... ... नहि श्रुतविशेषाः प्रश्नविषयं वेदितुमर्हन्तीति।

[3] P. 210.

[4] Yāj. II. 5-7; Nār. II. 1-2; Bṛhas. III. 1 2, IV. 9.—S. B. E., Vol. XXXIII, pp. 292-294.

[5] Sc., pp. 81-82.

[6] Sc., pp. 92-93.

are to consist of the statements of claim or charge and counter-claim or defence, and that all possible care is taken that these statements are as brief as the nature of the case will permit and further that they are free from all sorts of absurdities and ambiguities. The main object of the minuteness of the rules of pleading is nothing but enabling the tribunal to arrive at the real points in dispute or the issues as they are called and the parties to be apprised of the questions that may come up for decision. When a party has known the intended case of his opponent and the questions to be tried, it becomes possible for him to decide on what evidences he should rely. Thus we see the rule ' after the complaint and the answer have been duly recorded (that is to say, after each party has known the case of his adversary), the *arthī* (the party on whom the burden of proof lies) is to note down the evidence which he wants to adduce in support of his contention.' [1] This rule again is intended to give the opposite party an opportunity of knowing the nature of the evidence he will have to face and preparing a defence accordingly. Thus it becomes incumbent on the *arthī* always to keep to the subject-matter of the suit, because if instead of doing so he adduces some fresh evidence in support of a fact or ground of action which has not been mentioned beforehand, it will, besides taking the defendant by surprise, entail upon him great hardship and expenses if he wants to rebut such evidence by collecting fresh evidence. Moreover, if this process is allowed to go on, the case may never be finished. This being so, the necessity of telling the parties that they will not be allowed to prove facts essentially different from those stated in the *bhāṣā* (plaint) on one side and *uttara* (answer) on the other, or in other words, that they are to confine their evidences to the issues, becomes apparent. Hence we see Kātyāyana lay down ' after the declaration is formally written and answer given to it, if the plaintiff at the final hearing of the suit narrows down his own statement or makes an additional statement, he will lose the cause and not be

[1] Yāj. II. 7.

entitled to the relief or remedy applied for.' [1] Nārada also says 'where different words are subsequently inserted in the plaint and where the sense becomes different in consequence, there the judicial investigation becomes confused and the evidence itself is thrown into confusion.' [2] Asahāya illustrates this rule of Nārada by a very simple example; 'the plaintiff has claimed a certain sum from the defendant at the time of the declaration; at the time of the trial a larger sum is demanded; here the judicial investigation is much confused.' [3] This principle seems to be at work also in declaring the party who introduces a matter or ground of action in his plaint (*bhāṣā*) quite different from that mentioned in the original representation (*āvedana*) as non-suited and deserving to be fined.[4]

Our law-givers were, however, fully aware that refusal of sanction to alter the plaint at any stage of the trial might end in miscarriage of justice, because defective statements are sometimes made through error. We thus see a text of Bṛhaspati authorising amendment of the plaint of all its defects and redundancies.[5] Another text of Bṛhaspati empowers the judges to make amendments according to the circumstances of the case when the plaintiff cannot speak through timorousness.[6] It should be noted, however, that these amendments were not allowed at every stage of the trial, for both Nārada and Bṛhaspati provide that a plaint can be amended before the defendant has put in his answer and no amendment can

[1] लेखयित्वा तु यो वाक्यं हीनं वाप्यधिकं पुनः।
वदेद् वादी स हीयेत नाभियोगं तु सोऽर्हति॥—Sc., p. 106.

[2] अन्याक्षरनिवेशेन अन्यार्थगमनेन च।
आकुलं च क्रियादानं क्रियाचैवाकुला भवेत्॥—Nār. II. 17.

[3] Asahāya on Nār. II. 17.

[4] पूर्ववादं परित्यज्य योऽन्यमालम्बते पुनः।
वादसंक्रमणात् स्रष्टो हीनवादी स वै नरः॥—Nār. II. 24.
हीनवादी दण्ड्यो भवति—Mit. on Yāj. II. 9.

[5] न्यूनाधिकं पूर्वपक्षं तावदादौ विशोधयेत्—Vt., p. 14.

[6] Viram., p. 71.

be made afterwards.[1] The utility of this rule is obvious. For otherwise, as is pointed out by the Mitākṣarā, there may be infiniteness.[2] We may quote here the following lines from Dr. P. N. Sen's Hindu Jurisprudence explaining how this infiniteness may arise : " For otherwise there may arise what is called the fault of inability to stay (*anavasthā*), since if you allow an amendment of the declaration after the answer, the defendant may ask to put in a supplementary answer, which may be followed by a fresh amendment of the declaration to be met by a fresh answer and so on." [3]

How much should be proved.

Another very important principle recognised by the Hindu law of Evidence is that allegations must be proved in full and not partially. We have the following texts bearing on this subject :

पूर्वपादे हि लिखितं यथाक्षरमशेषतः ।
अर्थी तृतीय पादे तु क्रियया प्रतिपादयेत् ॥ [4]

' The contents of the plaint (*akṣara*) as written by the claimant in the first stage of the trial must be proved in full by means of evidence at the third stage.'

यत्राशेषः प्रतिज्ञार्थः साक्षिभिः प्रतिवर्णितः ।
स जयी स्यादन्यथा तु साध्यार्थं न समाप्नुयात् । [5]

' A party becomes victorious only when the substance of his declaration is proved in full by witnesses ; he will not succeed with his claim otherwise (*i.e.*, when it is not fully proved).

Now it may be asked, what is meant by allegations in full? The answer will not be difficult to give if we only look to the rules

[1] Vt., p. 14 ; Viram., p. 70.

[2] शोधनं च यावदुत्तरदर्शनं कर्तव्यं नातः परमनवस्थाप्रसङ्गात्—Mit. on Yāj. II. 6.

[3] Sen's Hindu Jurisprudence, p. 367.

[4] Nār. II. 27.

[5] Bṛhaspati (Sc., p. 210).

of pleading again. These rules require that all allegations in order to be comprehensive ought to comprise first of all an exact description of the time and place of the transaction. They should also contain such particulars as 'the complaint and its nature, the tribe, appearance and age, the dimensions and quantity of the property in dispute, the names of the complainant and his adversary, the names of their respective ancestors and of the ruling kings, the causes of forbearance, the grievance done and the names of the original acquirer and grantor.' [1]

It must be understood, however, that every one of these particulars is not essentially necessary for each and every kind of allegation. The nature of each individual case is after all the determining factor as to which of these particulars are matters of 'essential description' for it and thus need be proved. Thus we see that according to Kātyāyana specification of the local circumstances is particularly necessary in cases relating to immovable property. He says 'the country, place, site, tribe, name, neighbourhood, dimensions, nature of the soil, and the names of ancestors and of the former kings—these ten should be specified in a suit for immovable property.' [2] An anonymous *smṛti* text declares that if number is not specified in cases concerning things that can be counted, weighed and measured, landed property and the like, then they will be deemed destitute of the means of proof.[3] Evidently according to this text number is a matter of essential description in such cases. We know from Yājñavalkya that in cases of pledge, gift and sale, the prior contract has the greater validity.[4] It is thus evident that the specification of the year and month becomes necessary in such cases. The Mitākṣarā observes that in cases of monetary transaction (*arthavyavahāra*) also such a specification is indispensable.[5] The Smṛticandrikā adds that the

[1] Mit. on Yāj. II. 6 ; Sc., p. 82.

[2] Sc., p. 84 ; Mit. on Yāj. II. 6.

[3] Sc., p. 84 (गणिमे तुलिमे मेये तथा खेचरटङ्कादिके। यत्र संख्या न निर्दिष्टा सा प्रमाण-विवर्जिता).

[4] Yāj. II. 23.

[5] Mit. on Yāj. II. 6.

nature of the thing in dispute, the tribe, appearance and age, are matters of essential description in cases of theft, sale without ownership and the like and that the causes of forbearance are to be mentioned in allegations regarding properties which have not been taken proper care of.[1] According to this treatise further the specification of number and quantity is necessary in a case of theft as well just as in cases concerning things which can be measured, counted and weighed.[2]

Now, therefore, an allegation in full means an allegation with all its necessary particulars. The texts above quoted declare that when proper evidence has been adduced in support of the allegation made and its necessary particulars, or, in other words, when an allegation with all the matters of essential description has been fully established by means of evidence, then and then only the plaintiff will be declared to have won his case. When it is otherwise, that is to say, when there is no correspondence between the allegation and proof regarding any of the particulars considered most essential to such an allegation, the case will be deemed not proved.

This rule has a far more general significance. It follows from this rule that an evidence which tends to prove an allegation only in part and not in ail its essential particulars should be deemed as of no value. Thus we see the rules :

(1) any disagreement between the allegation and proof regarding time, place, matter, number, form, appearance, age and caste will have the same consequence as the total failure of evidence ;[3]

[1] साध्याख्या जात्याकारवयसां चौर्यास्वामिविक्रयादावर्थविवादेऽप्युपयोगः ।—p. 83.

[2] प्रमाणसंख्ययोर्मेयतुलिमगणिमादिद्रव्यविवादे चौर्यविवादे चोपयोगः—p. 83.

[3] देशं कालं धनं संख्यां रूपं जात्याकृतीं वयः ।
विसंवदेद यत साक्ष्यं तदनृतं विदुर्बुधाः ॥—Kāt. (Sc., p. 210).
देशकालवयोद्रव्यप्रमाणाकृतिजातिषु ।
यच्च विप्रतिपत्तिः स्यात् साक्ष्यं तदपि विप्लुतम् ।—Nār. IV. 233, साक्ष्यं तदपि चान्यथा —another reading.

and (2) when witnesses speak to more or less than the allegation, their evidences will be as good as ungiven.[1]

These rules in their turn were not followed, it appears, with a pedantic strictness. For, we meet a lengthy discussion in Vācaspatimiśra's Vyavahāracintāmaṇi recording the views of jurists belonging to both new and old schools of thought as to the advisability or otherwise of totally rejecting an evidence when it proves satisfactory in respect of the thing mentioned in the allegation but not so in respect of any of its necessary adjuncts, say, number. Supposing in an action for the recovery of one hundred rupees, a witness whose trustworthiness cannot be questioned says in his evidence that the number of coins borrowed was one hundred and fifty and not one hundred, the presumption will naturally be that he knows of the transaction though he has no correct notion about the number. A section of the old school of jurists is of opinion that in case the evidence given is of this kind, it should not be rejected altogether but be deemed conclusive as regards the thing alleged to have been borrowed, though not in respect of the number, for the ascertainment of which other means of proof should be resorted to.[2] Others of the old school such as the author of the Smṛtiṣāra and Bhavadeva are for observing the above rules too strictly and see no utility in adopting such a principle. They are of opinion that when a witness names a lower or a higher number in his deposition than is mentioned in the allegation, his evidence should be rejected altogether and the entire allegation should be established by other means of proof. Their arguments are that when a witness has made mention of a higher number, it is obvious that his evidence is worthless. For the remembrance of a thing depends upon the care and attention paid to it and thus it cannot be expected that he remembers a higher

[1] ऊनाधिकं तु यत्र स्यात्तत् साक्षी तत्र वर्जयेत् ।—Kāt. (Sc., p. 210).

[2] त्वं मह्यं शतं धारयसि एव च तदेद इत्युद्दिष्टः साक्षी यत द्रव्यं निगदति संख्यायान्तुह्यते तत द्रव्यांशे तन्निगदनिरस्तसंशयमपहायानिर्णीतसंख्यांशे मानान्तरमनुसरणीयमित्येके ।

—Vyavahāracintāmaṇi (in manuscript).

number though it is not remembered by the plaintiff himself. When he mentions a lower number the case undoubtedly becomes a different one. But then also the doubt which caused the judicial investigation to be commenced is not removed. Moreover, a statement which is based upon error cannot establish the truth of any other proposition.[1] The *navyas* (the jurists who belong to the new school of thought) reject the views of the former section of the old school jurists and accept those of the latter only partially. They realise that when a witness makes error in respect of number, his error in respect of the thing itself is quite possible. They are thus of opinion that when a witness does not mention at all the number or mentions a higher number than that mentioned in the allegation, his evidence should be rejected and other means of proof should be sought for.[2] When, however, a witness mentions a smaller number his evidence should receive a different consideration. Thus in an action for the recovery of one hundred rupees, if a witness says that the number of coins borrowed was fifty, it cannot be apprehended that his deposition is based upon error, for the non-mention of the rest of the sum may be due to forgetfulness even. The application of other tests of truth will be quite futile in respect of the part of the sum the transaction about which has been fully established by means of the aforesaid evidence. So this evidence should be deemed conclusive as regards the allegation up to fifty rupees and for the rest of the sum other proofs may be depended upon.[3]

[1] वादिना शतमाचिख्यासेन न तावदधिकाभिधानं साक्षिणः प्रमाणावगतसार्धशतयट्खमूलकमिति वक्तुं शक्यते, आदराभ्यासातिशयो हि स्मृतिमूलसंस्काराधायकः स चार्थिन एव युज्यते न तु साक्षिणः, तेनार्थी न स्मरति साक्षी च स्मरत्यधिकमिति नोपपद्यम्...न च भ्रान्तिमूलमभिधानमन्यतरप्रतिज्ञासत्यत्वे प्रमाणम्।

—Vyavahāracintāmaṇi (in manuscript).

[2] न्यूनानान्तु द्रव्यांस्तु विशेषः साक्षिणा सार्धा संख्यानभिधाने अधिकाभिधाने च सकलप्रतिज्ञायामेव क्रियान्तरं संख्यायां भ्रान्तस्य तस्य द्रव्येऽपि भ्रमसंभावनातः।

—Vyavahāracintāmaṇi (in manuscript).

[3] न्यूनाभिधाने च पञ्चाशद्यट्खण्डस्य भ्रान्त्यादिमूलत्वे श्रद्धाबीजाभावात् तदतिरिक्तानभिधानेतु प्रस्मरणस्यापि शङ्कितत्वात्। धर्मैव्यवहारेतु छलादेर्निरसनीयत्वात् पञ्चाशद्यट्खण्डनिगद आदीयते···साक्ष्यभिहितपञ्चाशत् पूरणातिरिक्ते निर्णयान्तरमिति विवेचनीयम्...

—Vyavahāracintāmaṇi (in manuscript).

Thus it becomes clear that though the rule was that there should be strict correspondence between the allegation and the proof, it was recognised at the same time that an evidence merely failing to establish a formal allegation need not be altogether rejected. A section of jurists thought and thought rightly that discrepancy as to number should not be regarded as a sufficient ground for the total rejection of an evidence.

Principle of Ekadeśa Proof.

When an allegation is comprised of several claims, the full proof of it would require the full proof of each and every one of these claims. An exception arises, however, when these claims are totally denied by the defendant. Yājñavalkya says that in the case of such a denial if the plaintiff can substantiate one of the claims, he will be entitled to all of them. The text is quoted below :

निह्नते लिखितं नैकमेकदेशे विभावितः ।
दाप्यः सर्वं नृपेणार्थं न ग्राह्यस्त्व निवेदितः ॥[1]

'If the defendant denies an allegation concerning several claims and if he is confuted in a part, he shall be made to pay all of them ; but that which has not been mentioned at the time of the original representation by the plaintiff should not be received by him. Vijñāneśvara observes that in cases like this the tribunal will be given the full liberty to act on presumption only. Supposing in an action for the recovery of gold, silver and cloths, the defendant totally denies having taken them, but is forced to make an admission by witnesses and other evidences in respect of a part of it, say, gold, then the presumption will be that as he has been proved to be false in one part of the allegation, he is false in other parts as well and because the plaintiff has been proved to be true in one part, he is certainly true in other parts also. It is quite natural that such presumptions may sometimes be wrong, but

[1] Yāj. II. 20.

Vijñāneśvara says on the authority of Gautama that in cases of the above description the judges will not be blamable for giving decision on wrong presumptions even.[1]

Yājñavalkya seems to be contradicted by Kātyāyana who says that in actions of debt and the like in which proof rests on comparatively certain grounds on account of the pre-appointment of evidence the plaintiff is to get that part only to which he can adduce satisfactory proofs and further that he will not succeed at all *if more or less* than his actual claim is proved. Kātyāyana's texts are as follows :—

अनेकार्थाभियोगेऽपि यावत् संसाधयेद्धनी ।
साक्षिभिस्तावदेवासौ लभते साधितं धनम् ॥
ऋणादिषु विवादेषु स्थिरप्रायेषु निश्चितम् ।
ऊने वाप्यधिके वार्थे प्रोक्तं साध्यं न सिध्यति ॥[2]

' When an allegation comprises many things, the creditor will get that thing only to which he can establish his claim by means of witnesses.'

' In all actions of debt and the like approaching to certainty, if more or less be proved, the claim will not be established.'

Vijñāneśvara notes the contradiction and makes an attempt at reconciling the texts of these two sages. His view regarding the rule contained in first verse of Kātyāyana is that it refers to a plea of ignorance and thus has a different scope of application.[3] It will apply, for instance, to the case of discharge of debts by the son or the heir contracted by his deceased father or ancestor. Thus if after the death of a person his son or heir finds himself sued for his debts alleged to be comprised of several things and if

[1] Mit. on Yāj. II 20 ;.....तथा च गौतमः—न्यायाधिगमे तर्कोभ्युपेयस्तेनाभुक्त यथास्थानं गमयेदित्युक्ता तस्माद्राज्ञाचार्यावनिन्द्यावित्युपसंहरति ॥

[2] Mit. on Yāj. II. 20 ; Sc., p. 283.

[3] तत् पुत्रादिदेयपित्राद्यविषयम्.....'निश्चिते लिखिते नैकम्' इति शास्त्रं तत्र न प्रवर्त्तते निश्चयाभावादपेक्षिततर्काभावाच्च.....—Mit. on Yāj. II. 20.

the latter pleads ignorance about all of them, the creditor will recover that thing only to which he can adduce satisfactory proof. Here proof of a part will not lead to the proof of the whole. The reason is that in such a case it is quite possible that the son or the heir does not really know anything about the debt and hence no presumption against his truthfulness or honesty will arise. The sum and substance of Vijñāneśvara's argument is that Yājñavalkya's text refers to a plea of *nihnava* (denial or concealment) and Kātyāyana's text to a plea of *ajñāna* (ignorance). A line of distinction is drawn between *ajñāna* and *nihnava* by the author of the Subodhinī. *Ajñāna* means an absence of knowledge of a thing, while *nihnava* means a wilful concealment of a fact though known.[1]

The other verse of Kātyāyana quoted above relates to a case, according to Vijñāneśvara, where the defendant having denied the several claims the plaintiff undertakes to prove all of them by the aid of witnesses and other means of proof but fails to do so. In such a case the plaintiff will not be deemed entitled to get anything at all.[2] The Subodhinī makes the point more clear by giving a concrete example. Suppose the plaintiff institutes a suit for the recovery of gold, silver and clothes and the defendant makes a total denial of his claims; the plaintiff thereupon calls in witnesses and says that they will bear testimony to the taking of all these things from him; the witnesses, however, prove his claim in respect of gold only or of gold, silver and cloth and of paddy in addition; the case being so the original claim of the plaintiff regarding gold, silver and cloth will be deemed as not established on account of the witnesses speaking to more or less.[3] When, however, the plaintiff on a plea of denial being put forth by the defendant says that he has witnesses with regard to gold only

[1] निह्नवो ज्ञातापलापः। अज्ञानं ज्ञानाभावः।—Subodhinī (in manuscript) on Mit. Yāj. II. 20.

[2] & [3] Mit. on Yāj. II. 20.

and not to other things and if the witnesses satisfactorily prove this part of the claim, then the plaintiff will be entitled to recover from the defendant all the things mentioned in the original representation.[1]

The defects of these interpretations of the texts of Kātyāyana and Yājñavalkya are too obvious. If it be a rule that the plaintiff will recover that part of the claim only to which he can adduce proper and satisfactory evidence against the plea of ignorance advanced by the heir after the death of his ancestor by whom the debt is alleged to have been contracted, then the defendant without any risk whatsoever and with perfect ease may take this plea even when he possesses a full knowledge of the transaction. In like manner if the plaintiff knows that he will be entitled to the full claim by the proof of a part only, there will naturally be a tendency in him to overstate his claim provided he is sure that he has sufficient evidence to support any particular part. In one case there will be given an undue advantage to the defendant and in the other to the plaintiff.

It is for these reasons perhaps that Yogloka proposes a different scope for the application of the principle of *ekadeśa* proof. According to him this principle is to be applied in cases of theft.[2] This view of his can be gathered from the interpretation put by him on a verse of Nārada which is similar in meaning with the verse of Yājñavalkya quoted above. As a matter of fact Nārada's verse is nothing but a paraphrase of the first three feet of Yājñavalkya's text. We quote it below for ready reference :—

अनेकार्थाभियुक्तेन सर्वद्रव्यापलापिना ।
विभावितैकदेशेन देयं यदभियुज्यते ॥[3]

[1] याज्ञवल्क्यवचनन्तु सुवर्णं च रजतञ्च वस्त्रादि च धारयतीत्यभियुक्तः प्रत्यर्थी न धारयामीति यदि निह्नुते तदा सुवर्णग्रहणे साक्षिणः सन्तीत्युपन्यस्य तावन्मात्रेऽपि साक्षिभिः साधिते प्रत्यर्थी पूर्वोक्तं स° दाप्य इत्येतत्परम् । —Subodhinī (in manuscript).

[2] Yogloka's view is recorded in the Vm. (p. 312)..,....इति यत् तार्किकम्मन्येन योग्लोकेनाभिहितम्.....

[3] Vm., p. 311.

"A person charged with several claims but denying all of them will have to pay every thing of the charge, if only a part is proved against him." The view of Yogloka has been accepted and expanded by Vācaspati. When *ekadeśa* may be treated as equivalent to *vyāpya*, that is to say, when the taking away of an *ekadeśa* or a particular part necessarily implies the taking away of the whole, then and then only the proof of *ekadeśa* may be deemed as proof of the whole. Thus, when the charge is the theft of a box containing gold, silver and cloth, presumption may naturally arise that the theft of gold cannot be effected without the theft of other things contained in the box, and hence the proof of theft of gold only against a man will lead to the conclusion that he is guilty of theft regarding other things as well.[1]

Yogloka's interpretation, we shall just see, has been severely criticised by Jīmūtavāhana. The arguments advanced against it appeal perhaps to Vācaspaṭi also and that is why we see him propose an alternative explanation which is again not his own but of an earlier commentator, namely Aparārka.[2] Now it is laid down by Yājñavalkya that if the claim be accompanied by a wager, the party who loses (in such a wagering cause) shall be compelled to pay the fine specified and the wager made to the king and the property forming the subject of the claim to the plaintiff.[3] Vācaspati in agreement with Aparārka says that if the defendant makes a wager to the effect that he will pay the whole if only a part be proved against him, then also there may arise an occasion for the application of Nārada's rule.[4]

[1] यत्रैकयाऽनेकमन्ययाऽन्यमभिचारि तद्विषयं व्याख्येयम्। तथा सुवर्णाद्यनेकवस्तुसहितं पात्रं चौरेण गृहीतं तत्रैकदेशस्यापि सुवर्णाद्यवयवस्य विभावने सर्वमेव देयम्। तथा चैकदेशपदं व्याप्यभूतैकदेशपरम्।

—Vyavahāracintāmaṇi (in manuscript).

अनेकार्थाभियुक्तेन सर्वद्रव्यापलापिना.....तदपि सावष्टम्भमित्योत्तरविषयम्.....

—Aparārka, p. 625.

[3] II. 18.

[4] एतद्वचनस्य न्यायमूलकत्वाद राजदण्डविषयं वा। तदुक्तं याज्ञवल्क्येन ··· सपणश्चेदित्यादि। एकदेशविभावनयापि मया सर्वं देयमित्यादियंत्र पण इत्यर्थः।

—Vyavahāracintāmaṇi (in manuscript).

Jīmūtavāhana's arguments against the interpretation of Yogloka are mainly two. First, the word *ekadeśa* means not *vyāpya* but an *aṁśa* (part) in relation to both *vyāpya* and *vyāpaka* [1] and thus should be understood in the sense of not-whole (*asarva*) being the counterpart of the remainder of the whole (*sarvaprati-yogī*).[2] The use of the word *alpa* instead of *ekadeśa* by Kātyāyana in the injunction **सर्वापलापं यः कृत्वा मिथ्याल्पमपि संवदेत्** confirms this view. Secondly the defect noted above, *viz.*, that there is nothing to check the plaintiff from misrepresenting the extent of his claim remains unremoved here also. If the whole is to be awarded by the proof of a part it should be ascertained first of all what that whole really is. Now the contents of the box cannot be ascertained from the mere words of the plaintiff because falsehood is possible in him. If it be said that they will be known by other means of proof, then also the fact that they were in the box till the moment of the crime will have to be established. It it be said again that it will be done by witnesses, then practically the fact of the box having been taken away will also be proved by them and thus there will be no scope at all for the application of the principle of *ekadeśa* proof.[3]

Another objection against Yogloka's interpretation is that it does not take into account a verse of Kātyāyana which without even any mention of *nihnava* or *apalāpa* says that in cases of adultery, assault and theft, the proof of a part will amount to proof of the whole.[4] It is evident from this text that in such cases even when there is no *nihnava* on the part of the defendant, the proof of any particular part or circumstance in connection with the crime will lead to the conclusion that the crime has been committed. Thus

[1] एकदेशपदस्य एकदेशान्तरे बुद्धिरित्यादौ व्यापकेऽपि दर्शनात् पदार्थस्य चांशमेकदेशपदमाह व्याप्यव्यापकयोरपि—Vm., p. 311.

[2] सर्वप्रतियोगिकमसर्वमेकदेशपदमाह—Vm., p. 311.

[3] Vm., p. 312.

[4] साध्यार्थांशेऽपि गदिते साक्षिभिः सकलं भवेत् ॥
स्त्रीसङ्गे साहसे चौर्ये यत् साध्यं परिकल्पितम् ॥—Aparārka, p. 625.

when it is proved that a young man has spent the night at a lonely place devoid of light with a woman quite young, the fact that they had sexual intercourse will be presumed from the single fact of their being with each other at such a place and at such a time.[1] Such a presumption will be absolute and conclusive, notwithstanding the absence of *nihnava* on the part of the accused.

Jīmūtavāhana's view regarding the principle of *ekadeśa* proof, therefore, is that it is to be applied not in cases of theft but in cases of debt contracted at several places and at different times. The expression *ekadeśa* is taken by him in the literal sense of ' a particular place.' Thus when a person has contracted debts at several places and being sued replies that he has discharged all of those debts, he will have to pay them all provided it be proved that the debt contracted at any of these places has not been discharged.[2]

Devanabhaṭṭa maintains the position that the *ekadeśa* principle should always be applied in criminal proceedings.[3] He is led into this conclusion evidently from the use of the expressions *nihnute* and *apalāpinā* in the texts of Yājñavalkya and Nārada. These expressions certainly imply dishonest motives and as a matter of fact it is held by Jīmūtavāhana that *nihnava* and *apalāpa* which means concealment of knowledge are nothing short of theft.[4] In the texts of Kātyāyana on the other hand occur the expressions *dhanī* (creditor) and *sthiraprāya vivāda* (actions in which proof rests on comparatively certainly grounds, evidence having been pre-constituted) and these texts therefore, Devaṇabhaṭṭa says, should be taken as referring to civil actions.

These discussions besides showing a great development of juristic ideas are important from another point of view also.

[1] Aparārka, pp. 625-26.

[2] यत्यत्र नानास्थानादत्त धनाभियोगे नानास्थानग्रहेषु सर्वापलापे कृते स्थानभेदे च भिन्नक्रियत्वात्तस्य च निषेधात् इष्टप्रमाणैनैकदेशज्ञापनात् सर्वसिद्धिरिति न्यायो द्रष्टव्यः।—Vm., p. 311.

[3] Sc., p. 209.

[4] स्तेयनिक्षेपादिष्वपह्नवस्य चौर्यदृष्टत्वात्—Vm., p. 312.

They go to illustrate that *sambhāvanā pratyaya* which is another name for *tarka*[1] and means ' presumption ' was thought indispensable to the administration of justice. The jurists of the past were fully aware that presumptions might not always be correct, but nevertheless they attached an artificial value to them from motives of policy. Their views regarding the scope of application of the *ekadeśa* proof might be different but they were all unanimous on the point that the presumptions derived from such a proof were irrebuttable and conclusive.

Oath.

" The first great safeguard which law provides for the ascertainment of truth in ordinary cases consists in requiring all evidences to be given under the sanction of an oath. This imposes strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise ; a wilful violation of the truth exposes him at once to temporal and to eternal punishment."

The Hindu law-givers of the past were fully alive to the importance of administering oaths to witnesses. There are innumerable references which indicate that oath prevailed in India even in very ancient times. Manu deals with the subject of oath at great length[2] and both Viṣṇu and Nārada equally feel the necessity of binding witnesses with oaths.[3] Kauṭilya's rule regarding the punishment to be inflicted on those who, though not authorised, examine witnesses and others on oath[4] is a clear proof of the antiquity of Hindu oath as administered to witnesses.

[1] एवं तर्कापरनामसंभावनाप्रत्ययानुग्रहीतादक्षादेव ··· —Mit. on Yāj. II. 20.

[2] Manu VIII. 80-102, 109-16.

[3] Nār. IV. 198; Viṣ. VIII. 19.

[4] Kau. III. 20. Clear references to oaths as administered to witnesses at the time of examining them are also found in Kauṭilya's Arthaśāstra in Chap. 11, Book III.

It will undoubtedly be of interest to us to see that the form of oath which we find prescribed by Manu is in substance not very different from what we find in modern courts. Manu's form is as follows :

" What ye know to have been mutually transacted in this matter between the two men before us, declare all that in accordance with the truth ; for you are witnesses in this cause." [1]

Vaśiṣṭha's form of oath, however, is a little different from that of Manu and we quote it below for ready reference :

" Depose, O witness, according to the truth expecting thy answer thy ancestors hang in suspense ; in accordance with truth or falsehood of thy deposition they will rise or will fall into hell." [2]

The Hindu oath has several parts. We may designate this part of the oath as religious part or oath proper. From the form in which this part of the oath is couched, it is evident that it was administered by the judge to the witnesses. The second part of the oath we may call the imprecatory part. This part of the oath invokes punishment and evil consequences in case the evidence given be false. There is a view that all oaths were principally imprecatory.[3] The imprecation, we shall see, was in a form 'adapted to the peculiarities of the influences by which each individual might be presumed to be most affected.' Authorities are at variance as to whether this part of the oath was also administered like the first part or taken by the witnesses themselves. The following verse of Nārada gives an idea of the second or the imprecatory part of the oath :

सत्येन शापयेद्विप्रं क्षत्रियं वाहनायुधैः ।
गोबीजकाञ्चनैर्वैश्यं शूद्रं सर्वैस्तु पातकैः ॥[4]

[1] VIII. 80.
[2] Vas. XVI. 32.
[3] अनृतं वदन् घोरं नरकं यास्यामीत्येवंरूपं मिथ्यानिरसनं शपथः इति साक्षः ।
See the word शपथ in the Śabdakalpadruma.
[4] Nār. IV. 199.

"Let the judge cause a priest to swear by his veracity, a soldier by his horse or elephant and his weapons, a merchant by his kine, grain and gold, a mechanic or servile man by imprecating on his own head, all possible crimes, if he speaks falsely." The Mitākṣarā explains this verse in this way: "the judge shall adjure a Brahmana by saying, if you speak falsely your truth (that is, merit due to truthfulness) will be destroyed; a Kṣatriya by saying, your horse or elephant or weapons will become useless; a Vaiśya, your cattle, seeds and gold will be unproductive; a Śūdra he shall adjure by saying, if you speak falsely, all sins will be on your head."[1] From this explanation it is clear that the author of the Mitākṣarā is of opinion that the imprecatory part of the oath as well is to be administered. Mitramiśra also follows him by saying that oath is to be given in the manner above described.[2] It should be noted here that this verse occurs exactly in the same form in the Manusmṛti as well.[3] Medhātithi, Haradatta and Maskari think apparently from the context, that this verse contains the oath which is to be applied to a party for his exculpation in a witnessless case.[4] Medhātithi comments that the imprecation is to take the form: "If I speak falsely my merits acquired by truthfulness will be destroyed," etc.[5] Or, in other words, according to him, the formula in which divine vengeance is to be imprecated should be put in the mouth of the swearer. This view after all is supported by the causative form *śāpayet*. The root *śap* means 'to take an oath,' 'to swear,' etc. So it is only reasonable to think that a causative form of it should mean 'to cause to swear or take an oath.' Viṣṇu's use of the expression *kritaśapatha*[6] (one who has taken

[1] Mit. on Yāj. II. 73.

[2] ... शपथो देयः—Vīrām., p. 160.

[3] VIII. 113.

[4] Haradatta and Maskari on Gau. XIII. 14, Medh. on Manu VIII. 113.

[5] यद्यहमेवं कुर्यां तदिदमनिष्टमवाप्नुयाम् इति सद्भीर्तनक्रिया शपथः।
—Medh. on Manu VIII. 113.

[6] Viṣ. VIII. 19.

oath) in the injunction above referred to tends also to corroborate this view.

Imprecation forms part of modern oaths as well. But there is this difference : under the ancient Hindu system divine vengeance was directly invoked by the witness if he did not speak the truth ; in modern systems on the other hand the witness invokes the attestation of a Superior Power in one of the following forms :—" God be my avenger, so help me God, God be my witness," etc. Thus in a way divine punishment is invoked here too. For, says Best, " when we call to witness a superior Being who has a right to inflict punishment on us, we by this act desire of him to avenge perfidy." [1]

The imprecatory part of the oath has been considered by many jurists of modern age as of questionable utility. Best observes :[2] 'Imprecation is, however, no part of the essence of an oath but is a mere adjunct of questionable propriety as calculated to divert attention from the true meaning of the ceremony and fix it on some external observance."

To the Hindus, however, this part of the oath was not an unmeaning formality. It was really meant to insure the utterance of truth and they really believed that God intervened with a punishing hand whenever a witness spoke falsely after his taking the oath. For, according to Manu, any calamity occurring to a witness through sickness, fire or the death of a relative within a week of his giving evidence should be taken as direct consequence of his giving false evidence in the court, and on that ground only he will be deemed guilty of perjury and liable to a fine.[3]

The oath is to be taken in a reverent manner. For we find it stated by Bṛhaspati that after putting off his shoes and turban a witness should stretch out his right hand and declare

[1] Best on Evidence, p. 45.
[2] *Ibid*, p. 44.
[3] Manu VIII, 108.

the truth.[1] This stretching of the hand has a certain resemblance to the uplifting of the hand in the Scotch form of oath. A text of Śaṅkha-Likhita occurring in the Vyavahāra-cintāmaṇi says that the witnesses are to be sworn with reference to various things—gold, silver, cow, paddy, the sun, fire, the shoulder of an elephant, the back of a horse, the middle part of a chariot, weapons, son, grandson, the various things of swearing to differ according to different castes.[2] Vācaspati remarks that these things are to be touched. In the case of son and grandson their heads are to be touched.[3] Nothing is said as to the sun ; evidently he is to be looked at. Bṛhaspati also enjoins that the oath is to be taken with reference to some outward symbol. Thus a witness has to take in his hands gold, cowdung or blades of sacred grass.[4] All these were calculated undoubtedly to impress the mind of the witness with the solemnity of the occasion. The touching of some sacred things by a witness at the time of taking the oath under the Hindu law may well be compared to the modern practice of swearing on the Korana by the Mahomedan and kissing the Bible by those who profess the Christian faith.

It is a peculiarity of the Hindu law of evidence that admonition also forms a part of the judicial oath. We find that almost all the authorities agree on the point that witnesses are to be regularly admonished before they are examined. We may call this admonition as the third part of the oath. The forms of admonition prescribed by different authorities are also not very different from each other either in language or in import. They all intend to create an awe in the witnesses

[1] विहायोपानदुष्णीषं दक्षिणं पाणिमुद्धरन्—Viram., p. 172.

[2] साक्षिणः सुवर्णरजतगोधान्यभूम्यग्निगजस्कन्धाश्वधृतरथोपस्थशस्त्रादिभिः।

[3] तथा पुत्रपौत्रैर्यथावर्णं परिगृहविशेषः स्यात्।—Vy. C. (in manuscript).

[4] सुवर्णेति सुवर्णादिस्पर्शनेन शापयेत्। पुत्रपौत्रैरिति पुत्रपौत्रशिरःस्पर्शनेन शापयेदित्यर्थः—Vy. C. (in manuscript).

[4] हिरण्यगोशकृद्दर्भान् समादाय—Viram., p. 172.

by extolling the virtue of truth and describing at length the impiety and dangers of falsehood. Nārada very distinctly says that "by ancient sacred texts extolling the pre-eminence of truth and by denouncing the sinfulness of falsehood he (the judge) will repeatedly inspire them with awe."[1] The manner in which truth and truthfulness are recommended to be extolled cannot but produce an impression in the minds of the witnesses. We give below a faithful rendering of some of the texts in praise of truth and truthfulness by which witnesses are to be admonished :—[2]

"Truth makes the moon shine
Truth makes the wind blow
Truth makes the earth bear (all that is upon it)
Truth makes water flow
Truth makes the fire burn
The atmosphere exists through truth
So do the gods
And so do the offerings."

"If veracity and a thousand horse-sacrifices are weighed against each other (it is found that) truth turns out to be heavier." "In this world the gods are acquainted with no one better than he of whom his conscious soul has no distrust when he gives evidence." "A witness who speaks the truth in his evidence gains after death the most excellent regions of bliss and here (below) unsurpassable fame; such testimony is rendered by Brahman himself."

"By truthfulness a witness is purified, through truthfulness his merit grows, truth therefore must be spoken by witnesses of all castes." "Truth is the self of man. Everything depends on truth. Therefore thou must be intent on acquiring bliss by thy own effort, by speaking truth."

[1] IV. 200.

[2] Viṣ. VIII, Vas. XVI, Nār. IV. 201-26, Manu VIII. 80-97. (See also Jolly's translation of Viṣṇu.)

The evil effects and sinfulness of giving false evidence are also to be pointed out in the following different ways :[1]

" He who gives false evidence is firmly bound by Varuna's fetters and rendered helpless during one hundred existences ; let men therefore give true evidence."

" Speak the truth and avoid falsehood. It is through truth that thou shalt attain heaven. By uttering a falsehood, thou wilt precipitate thyself into a most dreadful and hellish abode."

" And in the hells the merciless attendants of Yama endowed with great strength, will cut off thy tongue and strike thee with swords constantly."

" And attack and pierce thee with spears, while thou art wailing helpless. When thou art standing, they will fell thee to the ground and fling thee into the flames."

" After having thus endured for a long while the acute tortures of hell, thou shalt be born in this world and enter the horrid bodies of vultures, crows and other (despicable creatures)."

" Having discovered these evils with which falsehood is attended and knowing on the other hand the advantages resulting from veracity thou must speak truth and thereby save thyself. Do not ruin thyself wantonly."

" Thy ancestors are kept in suspense, when thou hast been appointed to give evidence (reflecting in their minds) : will he conduct us (unto heaven) or will he precipitate us (into hell) ? "

" Whatever lies between that night in which thou wast born, and that night in which thou art to die (thy whole life in fact) has been spent in vain by thee, if thou givest false evidence."

It goes without saying that when the principle of exacting an oath before receiving evidence was recognised, it was also seen whether the person whose evidence was going to be taken was fit to take oath after understanding its nature and responsibility. It is evident also from the imprecatory part

[1] Viṣ. VIII, Vas. XVI, Nār. IV. 201-26, Manu VIII, 80-97.

of the oath as well as from the manner in which admonition was repeated before the witnesses when they were going to be examined that the recognition of a Supreme Being as the rewarder of truth and avenger of falsehood coupled with a sense of accountability to Him was deemed essential to the taking of the oath. We may further deduce from the admonition part at any rate that the Hindu law-givers expected that the witnesses should have a belief in the future state of existence in order to qualify them to take oath.

Starting with these principles as correct we may well understand why certain classes of people were considered specially qualified to act as witnesses and why others were excluded. We find that the pious and the generous are among those who are qualified to be witnesses.[1] Viśvarūpa accounts for this by saying that such people practise austerities and make gifts with a view to securing a better position in a future state of existence and cannot therefore tell a lie.[2] We further see that such religious persons as perform the rites and ceremonies enjoined by *śruti* and *smṛti* are also qualified witnesses. Now it is a matter of common knowledge that no person can be deemed religious unless he has an unflinching faith in God and further that no person cares to perform the religious rites unless he has belief in a future state of existence. It becomes thus clear that in setting forth the qualifications of witnesses the text-writers included, though indirectly, a belief in God and future state of existence among them. The essentiality of such a belief as well as of the capacity to understand oaths for all witnesses is, however, better illustrated by the exclusionary rules. We have seen that children, lunatics and the drunk are to be excluded from the category of witnesses. The commentators have assigned various

[1] Yāj. II. 70-71.

[2] यो हि निष्कारणं परलोकसाधनैकप्रवणस्तपोदानादिप्रवणोऽतिशयितेतरवृत्तयप्रज्ञः स कथमिवात्मनो दृष्टादृष्टविरुद्धं विमार्गाश्रयिणः परस्यार्थेऽनृतं ब्रूयादित्यभिप्रायः ।

—Bālakriḍā on Yāj. II. 70-71.

reasons for their exclusion. It will not be unreasonable to think that incapacity to understand the nature and responsibility of oath occasioned by tender years in the case of children and unsoundness of mind in the case of the others is also a reason for the exclusion. *Nāstikas* do not believe in God and future state of existence and *bhinnavṛttas* (heretics) do not conform to the religious forms and deny all exercise of divine power in rewarding truth and punishing falsehood. Their exclusion is based on no other ground than this.

The test of competency on the score of religious belief underwent a great deal of discussion in the famous case of Omichand *v.* Barker which occurred as late as 1774 A.D. It was laid down even there also that the true test was the belief in a Supreme Being as the Avenger of falsehood and perjury among men. The doctrine of the civil law in this great case was just in accordance with the pronouncement of common law to the effect that a person who is destitute of the religious sense of accountability to the Omniscient Being should not be sworn, as such a person is sure to be insensible to the obligations of an oath. The following remark of Lord Chief Justice Wiles will speak for itself: "Oaths were instituted long before Christianity, were made use of to the same purpose as now, were always held in the highest veneration and are almost as old as the creation.....; therefore nothing but the belief in God that He will reward and punish us according to our deserts is necessary to qualify a man to take an oath. The forms indeed of an oath have been always different according to the laws, religion and constitution of those countries. But still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say."[1]

This law, however, has been considerably changed by the legislature in modern times. Atheism and other forms of

[1] Best on Evidence, pp. 43-44.

infidelity are no longer considered as grounds of incompetency and it is provided by the Oaths Act, 1888, that "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken an oath."

Oaths were applied not only to the witnesses. We know from Gautama and Viṣṇu that the judge in ancient days had power in deciding doubtful cases by means of oath administered by him to either of the parties.[1] The *Arthaśāstra* also bears testimony to such a practice. The commentator Maskari points out, apparently on the authority of Manu, that the necessary condition of the administration of such oaths was that other more legal methods must have failed.[2] The verse of Manu **सत्येन शापयेद्विप्रम्**,[3] as has been already noted, refers to such oaths according to some commentators. Medhātithi says that *śapatha* means 'invoking of an undesirable contingency upon oneself and stands for the whole *daiva anumāna*' and thus includes ordeals.[4] We learn from another verse of Manu that the party instead of invoking evil consequences on himself may involve his own family—he may touch with his hand the heads of his son and wife severally and utter the swearing words.[5] The oath contained in the two *sūtras* of Gautama (XIII. 13 & 14) is also not to be applied to witnesses as Vācaspati thinks[6] but to a party for the purpose of deciding doubtful matters where other means of proof are wanting. This is at least the view of the commentators

[1] Gau. XIII. 13-14, Viṣ. IX.

[2] यदा तु साक्ष्यादिप्रमाणान्तरप्रत्यस्तमयः तदा शपथेन—Maskari on Gau. XIII. 13.

[3] Manu VIII. 113.

[4] सत्यादिनिबन्धनोऽयं धर्मो मे निष्फलः स्यात्—Medh. on Manu VIII. 113.
सत्य शपथेनापि दैवेनानुमानेन—Medh. on Manu VIII. 108.

[5] VIII. 114. [6] Vy. C. (in manuscript).

Haradatta and Maskari. Nārada also advocates the use of oaths as an independent means of proof.[1] According to Gautama such oaths should be sworn in the presence of the images of gods or the Brāhmaṇas or of the king. Gautama's texts further imply that oaths for the purpose of exculpation cannot be administered to the Brāhmaṇas.[2] But Manu and Nārada are positively against this view. Manu says that the taking of oaths is recorded of the gods and sages—even Vaśiṣṭha swore an oath before king Sudāsa, the son of Piyavana.[3] Nārada adds that Vaśiṣṭha took an oath when he was accused of having assumed the shape of an evil spirit.[4] Nārada further tells us that the seven Ṛṣis resolutely took an oath together with Indra in order to clear themselves mutually of suspicion when each was suspected by the rest of having taken lotus-fibres.[5] According to Medhātithi and Govindarāja the seven Ṛṣis actually charged each other with the theft of lotus-fibres and purified themselves by oaths. Indra also took the oath, they further point out, to clear himself from the accusation of an intrigue with Ahalyā.[6]

Oath as a judicial process was known even in the Vedic age and in all probability the story of Vaśiṣṭha told by Manu and Nārada has its origin in a verse of the Ṛgveda itself. In this verse (VII. 104.15) Vaśiṣṭha imprecates death on himself if he is a demon and death on his enemy if he is not. Sāyaṇa has the following story about Vaśiṣṭha's taking oath: "a demon killed one hundred sons of Vaśiṣṭha. He then assumed Vaśiṣṭha's form and accused the real Vaśiṣṭha of murder calling him a demon. Vaśiṣṭha then swore an oath and freed himself from the accusation."[7] We may get some idea

[1] Nār. IV. 239. [2] Gau. XIII. 14. [3] VIII. 110.
[4] Nār. IV. 243. [5] Nār. IV. 244.
[6] Medh. and Govindarāja on Manu VIII. 110.
[7] प्रायेणेदमादिभिर्ऋषिभिः राक्षसेन सह संघर्षा शपथः क्रियते। यत्र केचिदाहुः—
हत्वा पुत्रशतं पूर्वं वसिष्ठस्य महात्मनः।
वसिष्ठं राक्षसोऽसि त्वं वासिष्ठं रूपमास्थितः॥
अहं वसिष्ठ इत्येवं जिघांसुं राक्षसोऽब्रवीत्।
अथोत्तरा ऋचो दृढा वसिष्ठेनेति न श्रुतम्॥—Sāyaṇa on Ṛgveda VII. 104. 15.

of the form of such oaths from the verse just referred to. We quote it below for ready reference :—

अद्या मुरीय यदि यातुधानो अस्मि यदि वायुस्ततप पूरुषस्य ।
अधा सवीरैर्दशभिर्वियूयायो मामोचं यातुधानेत्याह ॥[1]

"If I am a demon and have cut short the life of any man, I shall die to-day. If I am not the culprit, then let you who falsely call me a demon die with your ten heroic sons."

Viṣṇu is of opinion that exculpatory oaths should not be administered to really good or to really bad persons.[2] He thinks perhaps that oath will be of very little force to either of these two classes of people inasmuch as the former will speak the truth even without an oath and the latter will always mock at its obligation. So his idea evidently is that those whose honesty has been proved by their previous acts should be trusted on their bare word and those who have been formerly convicted of crime or perjury should be tried by some other means of proof such as witness where they are available or ordeals in their absence even in a very trifling matter. Oaths according to him evidently are meant for 'generality of mankind who are of the middle sort,' *i.e.*, for those who are not as virtuous as the sages are and at the same time not absolute moral wrecks.

We have seen that in the Vedic age oath could be taken by the accused even when the matter to be decided happened to be a very serious one. Manu does not particularise any offence for the application of such oaths, but merely states that they are to be resorted to when witnesses are wanting.[3] This absence of particularisation on his part shows that he advocates the administration of oaths indiscriminately in all matters of contest. The rule, however, underwent a great change in later times. For, the Viṣṇusmṛti says that higher offences

[1] Ṛgveda VII. 104. 15.
[2] IX. 18-19.
[3] Manu VIII. 109.

are within the province of ordeals and oaths can be administered in lieu of them in cases of the denial of deposit, theft, and robbery only when the amount involved is small.[1] The minimum amount for which a Śūdra should take oath has been fixed as less than a *kṛṣṇala*[2] and Vaiśyas, Kṣatriyas and Brāhmaṇas can take oath only when the amount involved is twice, thrice and four times as much respectively.[3]

The Viṣṇusmṛti introduces some ceremonial also in respect of the taking of exculpatory oaths. It lays down that certain things should be put into the hand when oaths are to be taken. The same kind of thing is not to be used in all cases, but it is to differ with the difference in the amount in dispute. Thus when the amount is less than a *Kṛṣṇala*, a Śūdra is to swear by a blade of *dūrvā* grass (which he must hold in his hand), if it is one or more than one but less than two *kṛṣṇalas*, by a blade of *tila*, if it is two or more than two but less than three *kṛṣṇalas*, by a blade of silver and if it is three or more than three but less than four *kṛṣṇalas*, by a blade of gold and if it is four or more than four but less than five *kṛṣṇalas*, by a lump of earth taken from a furrow. When it is a *suvarṇa* he must undergo the ordeal by sacred libation.[4] Other ordeals are to be resorted to when the amount involved is more than that.[5] The things by which oath is to be sworn remain the same for all castes but only, as has been noted above, a slight distinction is observed in the actual taking of oaths by different castes which is determined by the amount involved in each case. Somadevasūri in his Nītivākyāmṛta does not specify any offence for which a man can swear an oath. But according to him the things by which

[1] Viṣ. IX. 5 and 11.

[2] Kṛṣṇala was practically the smallest weight used ; it was also termed *raktika* and its weight was 0·122 grammes. See Manu VIII. 134.

[3] IX. 5-14.

[4] Viṣ. IX. 5-10.

[5] Viṣ. IX. 11.

oath is to be taken must be different in the cases of the different castes. Thus a Brāhmaṇa is to swear by touching his sacred thread and gold, a Kṣatriya by touching weapons, a precious stone, the ground and *palyāna*, a Vaiśya by touching his ears, his child or a *cowrie* (or a sum of money equal to 30 *cowries*) and gold, and a Śūdra by touching milk and seed or an ant-hill. The artisans on the other hand are to swear by touching their respective implements and those who have taken vows by touching the feet of their spiritual guide. Hunters should be made to pass over their bows and the outcastes are to split a piece of leather which is wet. The commentator of the Nītivākyāmṛtā quotes several verses attributed to Guru (Bṛhaspati ?) in support of the forms of oath advocated by the Nītivākyāmṛta.[1]

A verse of Manu tells us that false swearing is always to be condemned. The person guilty of it is subjected to both temporal and spiritual punishment.[2] Medhātithi comments that besides condemnation to hell and public obloquy, he will receive punishment at the hands of the king also.[3] An exception to the prohibition of false swearing is, however, provided in another verse of Manu. It purports to say that there is nothing wrong in swearing falsely to a courtesan or wife with a view to getting one's desires fulfilled—in such words as 'I do not love any other woman, thou art the beloved of my heart,' etc., in connection with marriages (*i.e.*, for the purpose of getting oneself married by inducing the bride or her relatives in such words as 'I shall not marry any other woman,' etc.), for the sake of fodder for cows, or for the sake of fuel for sacrifice or for the sake of doing good to a Brāhmaṇa.[4] The idea underlying this rule evidently is that the crime is to be excused either when the nature of the

[1] Nītivākyāmṛta, Vivādasamuddeśa, 30-37.

[2] Manu VIII. 111.

[3] प्रमाणान्तरत्वज्ञाते राजदण्ड:—Medh. on Manu VIII. 111.

[4] Manu VIII. 112.

act in respect of which oath is falsely sworn is quite inoffensive or when the purpose of the act is sacred.

All these references to oath are important in more ways than one. First they go to prove that the history of oath can be traced back to a very early period so far as India is concerned. Secondly they show that the exculpatory oaths were not peculiar to tribunals only but were freely used among men outside the tribunals as well. In this connection the following remark made by Best regarding the character and antiquity of oaths in general will bear repetition. "Oaths, however, it is well known are not peculiar to courts of justice, nor are they even creatures of municipal law, having been in use before societies were formed or cities built and the most solemn acts of political and social life being guarded by their sanction. And however abused or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration." It should also be noted that ancient India does not stand alone in having resorted to oaths which we have characterised as exculpatory. 'Decisory oath' which either of the litigant parties might tender to the other and 'suppletory oath' administered by the judge for deciding doubtful cases were known in early times in other countries as well. These oaths, be it remembered, were invested, just as Indian oaths, with a conclusive effect. In this connection we may read the following remark of Best with interest. "Formerly a system of wholesale swearing pervaded every part of the administration of this country (England): it was observed..... a pound of tea cannot travel regularly from the ship to the consumer without costing half a dozen of oaths at the least."[1]

[1] Best on Evidence, p. 47.

Perjury : its Tests.

Manu declares that evidence given by reason of greed, embarrassment, terror, friendship, lust and wrath or from ignorance (inadvertence) and childishness (unsteadiness of mind) is false.[1] The idea evidently is that when testimony is not voluntary but is influenced by some cause or when it is delivered inadvertently or by one who has not yet acquired steadiness of mind, it is practically certain that accuracy and completeness, the two main qualities of testimony will suffer and consequently such testimony will be false. Another verse of Manu seems to suggest that testimony can be false in two ways; first when a witness misrepresents a fact and secondly when he affirms a fact of which he has no direct knowledge.[2]

A good way of detecting falsehood in a witness, as has been already stated, is to mark his demeanour consisting in confusion, incoherent statements and vacillating or contradictory answers at the time of the examination.[3] Kātyāyana puts much stress upon contradiction between the several statements of a witness as a test of the falsehood of his evidence. He says, "when a witness having said something contradicts it afterwards, he should be known as a prevaricator and punished."[4] This text clearly indicates that contradiction appears in its most damaging aspect when it is made by an individual witness himself. When, however, there is contradiction between one witness and another called by a party, it is not so dangerous ; it will only affect the credibility of that witness who is of inferior calibre. This is clear from the rules about the weighing of evidence.

[1] VIII. 118.
[2] VIII. 95.
[3] *Ibid*, p. 114.
[4] उक्ताऽन्यथाऽनृताभाषा दण्ड्याः स्युर्वाक्कलान्विताः—Vīram., p. 184.

We have a verse from Yājñavalkya which deserves special notice in connection with the question of perjury. The verse is as follows :

उक्तेऽपि साक्षिभिः साक्ष्ये यद्यन्ये गुणवत्तमाः ।
द्विगुणा वान्यथा ब्रूयुः कूटाः स्युः पूर्वसाक्षिणः ॥[1]

'Evidence having been given by witnesses, if others who are more respectable or double in number contradict them, the first deponents will become falsified.'

Some commentators think that this verse promulgates the rule that when perjury is committed by a number of witnesses in concurrence with one another, the best way of detecting it is to see if they are contradicted by witnesses who are double in point of number or more respectable, these witnesses being produced by the opposite party.[2] The main objection against this interpretation is, as pointed out by Vijñāneśvara, that evidence can be adduced by that party on whom the burden of proof lies (*arthī*) and not by his adversary, inasmuch as it is a settled principle that evidence cannot rest on both the parties.[3] Aparārka sees no force in such an objection. He says that it is true that both the parties cannot produce evidence, but this rule is to be applied when the subject of evidence is one and the same. When, however, the defendant is convinced that the evidence given against him by the witnesses of his opponent is false, he may prove this fact by means of witnesses more reliable or greater in point of number.[4] As a matter of fact a legal text attributed to Kātyāyana goes to corroborate this view. It declares that if a certain thing has been established by the complainant by means of certain witnesses and if the defendant knowing it to be false proves it to be so by means of other witnesses who are more

[1] II. 80.
[2] Mit. on Yāj. II. 80.
[3] तदसत् प्रत्यर्थिनः क्रियानुपपत्तेः ।—Mit. on Yāj. II. 80.
[4] Aparārka, p. 679.

respectable or more numerous, then the witnesses of the complainant will be known as perjured.[1]

Vijñāneśvara's interpretation of the text of Yājñavalkya is that it enacts a rule to the effect that when the witnesses of a party become adverse, he may contradict them by other evidence given by witnesses more numerous or more respectable and thereby prove the perjury of the former witnesses, or, in other words, the text sanctions the practice of setting one set of witnesses against the other by the same party. Thus when some witnesses give evidence designedly contrary to the subject-matter of the claim, the party who called them may call in other witnesses more respectable or double in point of number, and if they depose conformably to the claim, then the former witnesses will become falsified or perjured.[2] A point to be noted in this connection is that Vijñāneśvara thus recognises that in the event of one's own witnesses proving hostile, he may call other witnesses who may give contradictory evidence, for it would be contrary to justice that a party should be made to lose his case through the treachery of his witnesses merely on the principle that no one should be allowed to discredit the witnesses he himself has called.

We have seen in the chapter on 'weighing of evidence' that agreement between witnesses who are quite numerous or respectable is a test of their veracity as against the deposition of those less numerous or less respectable. Thus the evidence of twenty men or of one learned and religious man is to be deemed more conclusive and trustworthy than that of ten men or of an ordinary man respectively. The text of Yājñavalkya quoted in this chapter, whatever be its scope of application, indicates in addition that the opposing evidence of the former class of witnesses will be a proof of perjury for the latter

[1] यत्रैव भाषितं कार्यं साक्षिभिर्वादिनो भवेत्। प्रतिवादी तदा तत्र भाषयेत् कार्यमन्यथा। बहुभिस्तत् कुलीनैर्वा कृता: स्यु: पूर्व-साक्षिण:॥—Aparārka, p. 679.

[2] Mit. on Yāj. II. 80.

class. To put the whole thing in a nut-shell, superior number and superior respectability are not only the tests of value but of perjury also for the inferior number and inferior respectability. It may here be noted that according to some other commentators—and they are earlier than Viśvarūpācārya even—the rule of Yājñavalkya does not promulgate a test of truth on the one side and perjury on the other, but has merely a bearing on the question of the burden of proof. It has been seen that there is a view that in the case of two affirmative statements made by two opposite parties the rule is that the party making the first representation is to be put on proof. The commentators just referred to think that the rule embodied in Yājñavalkya's verse provides an exception to this particular rule. To be more clear, when the witnesses of the *pūrvavādī* (the party who has made the representation first) and of the *uttaravādī* (the party who has made the representation subsequently) are equal in points of respectability and number, then the witnesses of the *pūrvavādī* are to be examined but the process will just be the reverse, *i.e.*, the witnesses of the *uttaravādī* will have to be examined when they are superior in these respects. Vijñāneśvara summarily rejects this view saying that it has been rejected by *ācārya* (the Vyavahārabālambhatti and Subodhinī understand this term as referring to Viśvarūpācārya) on the ground that such an idea is not conveyed by the text of Yājñavalkya ; it can neither be deduced from the context nor from the subject-matter of the verse.[1]

Punishment for Perjury.

Gautama says, 'a false witness is to be censured and punished for speaking an untruth.'[2] In the opinion of Haradatta the censure is to take the form "nobody should have

[1] Mit. on Yāj. II. 80.
[2] XIII. 23.

any intercourse with him."[1] As to the modes of punishment to be inflicted on false witnesses we should look to the texts of other authorities. Manu in the first instance prescribes fine as a mode of punishment and says that the amount of fine is to vary according to the motive or reason for speaking the untruth.[2] When a man commits perjury being bribed by another, it is evident that he has done it from greed. In such a case his punishment will be a fine of one thousand *paṇas*. Sometimes it happens that a witness, though very honest and accustomed to speak the truth, may get confused at the time of his examination on account of some distraction of the mind and thereby his deposition may turn out to be false. In such a case the reason is embarrassment (*moha*) and the punishment prescribed is a fine of *pūrvasāhasa* (lowest amercement).[3] Sometimes it may enter into the head of a witness that if through his giving true evidence a party is defeated the latter will bring ruin upon him by injuring his relations or making him suffer financially. The reason of giving false evidence here is fear and the punishment for it will be a fine of two *madhyamasāhasas* (middle amercement). Similarly if a witness gives false evidence from a consideration of friendship or out of wrath he will have to pay a fine four times the amount of *pūrvasāhasa* (lowest amercement) and three times *madhyamasāhasa* (middle amercement) respectively. Punishment will be very high in case false evidence is caused by sexual love. Thus if a person deposes falsely from love he bears to a female happening to be one of the parties, he will be fined 2,500 *paṇas*. The offence is comparatively light when a witness gives false testimony through *ajñāna* (this term generally means *jñānābhāva, i.e.*, ignorance, but Medhātithi takes it here in the sense of *bhrānti, i.e.*,

[1] सर्वरत्नसंव्यवहार्यं इति।

[2] Manu VIII. 120-121.

[3] 'Two hundred and fifty *paṇas* are declared to be the first or lowest amercement, five hundred are considered as the mean (or middlemost), but one thousand as the highest.'—Manu VIII. 138.

mistake), specially if he corrects himself afterwards. Consequently the punishment in such a case is also not heavy. Thus if a man through this cause says what is not the fact but corrects himself at the time of the regular examination, his punishment will consist of a fine of 200 *paṇas*. The punishment is still lighter, *e.g.*, a fine of 100 *paṇas*, when the cause of perjury is *bālabhāva* (childishness).[1] One who has not acquired steadiness of mind is termed a *bāla*. It is known that a *bāla* cannot generally be a witness ; so the fine of 100 *paṇas* prescribed for perjury caused by childishness refers to the case of one, commentators say, who has just passed his minority.[2]

These rules apply to all castes including the Brāhmaṇa when it is proved that the accused has committed perjury for several times and when the particular motive of committing it is also well known.[3]

Yājñavalkya's text regarding the punishment of perjury is as follows :—

पृथक् पृथग् दण्डनीया: कूटकृत् साक्षिणस्तथा ।
विवादाद्द्विगुणं दण्डं विवास्यो ब्राह्मण: स्मृत: ॥[4]

The meaning of this text is that suborners as well as witnessess guilty of perjury are liable to be punished severally with a fine double the amount of the suit, that is to say, double the amount which is to be awarded as punishment to the defeated party on account of his loss in the suit and in the case of a Brāhmaṇa the punishment should be *vivāsana*. Vijñāneśvara thinks that this rule will operate where the reason or motive of committing perjury is not known and when at the same time

[1] Medh. on Manu VIII. 120-121.

[2] देवदयकालबालभावस्य दण्डोऽन्यस्य त्वसाक्षितैव ।—Medh. on Manu VIII. 121.
बालिश्यमताप्राप्तमावयौवनत्वं न बाल्यम् ।—Bālaṁbhaṭṭi, p. 291.

[3] लोभादिकारणविशेषपरिज्ञानेऽभ्यासे च मनुनोक्तम् ।—Mit. on Yāj. II. 81.

[4] Yāj. II. 81.

this offence is known not to be a repeated one, *i.e.*, when it is not habitual.[1] *Vivāsana* has the meanings of denudation, destruction of the dwelling house and banishment. The nature of each individual suit is to determine which of these three meanings is to be given to the term.[2] The Smṛticandrikā states that where the punishment or fine for people of other castes guilty of perjury is small (*alpa*), large (*bahu*) or enormous (*atibahu*), that for a Brāhmaṇa will be denudation, unhousing and banishment respectively.[3] This view is not quite in agreement with Vijñāneśvara's. For Vijñāneśvara is of opinion that punishment of fine and not of denudation is to be prescribed for a Brāhmaṇa also when the subject-matter of the suit is small. Evidently he thinks that denudation is a heavier punishment than fine.[4]

Manu has another text also on the subject of punishment for false witnesses. It declares that the punishment for the three inferior castes giving false evidence is *pravāsa* coupled with the prescribed fine, while for a Brāhmaṇa it is *vivāsana* only.[5] Commentators explain that this rule is to apply when the offence has been proved to be a repeated one.[6] We may note here that *pravāsana* as a punishment for perjury has been sanctioned by the *arthaśāstra* also.[7] According to Kullūka and some other later commentators *pravāsa* means banishment.[8] But Medhātithi and Vijñāneśvara are of opinion that it signifies corporal punishment as well. Vijñāneśvara further says that

[1] एतच्च लोभादिकारणविशेषापरिज्ञाने अनभ्यासे च वेदितव्यम् ।—Mit. on Yāj. II. 81.

[2] विवासयेत् स्वराष्ट्रान्निष्कासयेत् । यद्वा विवासयेत् नग्नीकुर्यात् । अथवा विवासयेद् भग्नगृहं कुर्यात् । जातिद्रव्यानुबन्धाद्यपेक्षया विवासनं नग्नीकरणं गृहभङ्गो देशान्निर्वासनं चेति व्यवस्था द्रष्टव्या ।

—Mit. on Yāj. II. 81.

[3] Sc., p. 215.

[4] Mit. on Yāj. II. 81.

[5] Manu VIII. 123.

[6] 'But when the motive for committing it is not known.' एतच्चाभ्यासविषयम् (Mit.) ; see also Medh. on Manu VIII. 123.

[7] Kau. IV. 4 : कूटसाक्षिण इति प्रवासयेत् ।

[8] स्वराष्ट्रादिवासयेत्—Kul. on Manu VIII. 123.

corporal punishment includes cutting off the lips, amputation of the tongue and deprivation of life.[1] This view is supported by a further statement to the effect that *pravāsa* has the meaning of corporal punishment in the political science (*arthaśāstra*) and that the subject under discussion has a close relation to such a science.[2] We know from a text of Nārada that corporal punishment includes imprisonment as well.[3] The precise nature of the corporal punishment will be determined after all by a consideration of the subject of false evidence.[4] As regards *vivāsana*, it must be interpreted here also to signify denudation, deprivation of the dwelling house and banishment with reference to the status and motive of the offender and subject-matter of the suit. Kullūka's conclusion about the punishment of a Brāhmaṇa is that it should only be *vivāsana* and not fine. He quotes the authority of another text of Manu to show that a Brāhmaṇa should always be exempted from pecuniary penalty.[5] This commentator thus goes against the view of the Mitākṣarā on this point according to which the punishment of fine may be inflicted on a Brāhmaṇa after a consideration of the circumstances which led him to commit perjury. For, if the principle that a Brāhmaṇa cannot be fined be accepted as a final one, then it would follow that even in a case where this offence is not at all grave a Brāhmaṇa should be punished by denudation, destruction of the dwelling house or banishment or he should go unpunished altogether. The Mitākṣarā further points out that the punishment of fine in the case of a Brāhmaṇa has been sanctioned by some legal authorities including Manu

[1] Medh. on Manu VIII. 123 ; Mit. on Yāj. II. 81.

[2] अर्थशास्त्रे प्रवासशब्दस्य मारणे प्रयोगात् तस्य चार्थशास्त्ररूपत्वात्—Mit. on Yāj. II. 81.

[3] Nār. 54 (appendix).

[4] कौटसाक्ष्यविषयानुसारेण द्रष्टव्यम्—Mit. on Yāj. II. 81.

[5] Kul. on Manu VIII. 123; न जातु ब्राह्मणं हन्यात् सर्वपापेष्ववस्थितम्। राष्ट्रादेनं बहिः कुर्यात्समग्रधनचयम् ॥—Manu VIII. 380.

himself.[1] The text on the authority of which Kullūka bases his decision has also not been left unreconciled. The rule embodied in this text, the Mitākṣarā says, is not a general one applying to all cases but relates only to the case of assault committed for the first time.[2] Govindarāja accepts the position taken up by this commentary regarding the punishment of a Brāhmaṇa for perjury and says that it should be denudation preceded by fine. Viṣṇu's punishment for a perjuror is the confiscation of his entire property.[3] This rule has been interpreted by some as referring to the case of perjury committed in respect of landed property and by others to the cases of the Śūdras and of those who are not at all virtuous.[4] Vācaspati thinks that it is to apply to the case of one who is habituated to give false testimony.[5]

It has been seen above that *dṛṣṭadoṣa* and *kūṭakāraka* are incompetent witnesses. *Dṛṣṭadoṣa* means, according to some commentators, a person who has formerly been convicted of perjury or whose habit of speaking falsehood has been detected.[6] *Kūṭakāraka*, as has been noted, may be the same as *kūṭakṛt* of Yājñavalkya and may mean a suborner. Thus it may be asserted that the punishment of suborners and false witnesses consisted also in their being disabled to give evidence on all future occasions. Evidently giving evidence was considered rather as a right or privilege than as a mere duty.

Testimony is false by omission when it is withheld. The Hindu law of evidence does not allow any excuse for such falsehood even. Gautama distinctly says, 'if being asked a witness does not answer, he is guilty of a crime.'[7] Nārada is

[1] Mit. on Yāj. II. 81. See also Manu VIII. 378.

[2] ... इति तत् प्रथमकृतसाहसविषयम्, न सर्वविषयम् ।—Mit. on Yāj. II. 81.

[3] V. 175.

[4] ... तदभूम्यनृतविषयमिति कैश्चिदुक्तम्, यद्वाधमजातिविषयं वा द्रष्टव्यम्—Sc., p. 217.

[5] एतच्च तच्छीलविषयम् (Vyavahāracintāmaṇi in manuscript).

[6] Chapter on 'competency and incompetency of witnesses.'

[7] XIII. 6.

more emphatic. According to him a man who conceals at the time of the trial what he really knows and has related to others is a greater criminal than a false witness and deserves specially heavy punishment.[1] Kātyāyana's rule regarding the punishment of a witness for concealing his evidence is more definite. According to him a witness who does not say anything when questioned should be imprisoned, condemned and fined according to law. His fine will consist of three hundred coins in suits regarding verbal assault, fraud or quarrel and of the whole amount of debt in a suit regarding debt.[2] We have a text of Yājñavalkya also on the subject. It refers to the punishment of a witness for concealing his evidence from others when witnesses are to be examined all together and not separately. The punishment, as the text indicates, is to be extremely heavy. It is to consist, for the three inferior castes, in a fine eight times the amount to be paid by the defeated party on the loss of his claim, and for a Brāhmaṇa in *vivāsana*.[3] The Mitākṣarā explains that the punishment of *vivāsana* is to be awarded to a Brāhmaṇa only when he is unable to pay the prescribed fine. When the people other than the Brāhmaṇas cannot pay the fine, they will be chained, sent to jail or made to give services as sanctioned for their respective castes.[4]

The punishments of witnesses guilty of perjury by commission or omission and of suborners have been described. These punishments, like all other punishments, were inflicted from a consideration of public interest. Manu says, 'the penalties for false evidence have been prescribed to prevent failure of justice and restrain injustice.'[5]

[1] श्रावयित्वा ततोऽन्येभ्यः साधियं यो विनिह्नुते ।
स विनेयो भृशतरं कूटसाक्ष्यधिको हि सः ॥ —IV. 197.
See also Sc., p. 212.

[2] Sc., pp. 212-213.

[3] II. 82. See Mit. also on the same.

[4] ब्राह्मणं पुनरदृगृषद्रव्यदण्डदानासमर्थं विवासयेत्—Mit. on Yāj. II. 82.

[5] Manu VIII. 122.

Kātyāyana prescribes punishment for the party also who through the greed of attaining victory calls in those as witnesses who are known to have committed perjury on some former occasion—the proper punishment for such a man is to be the confiscation of his entire property to be followed by banishment.[1]

From what we have seen it becomes clear that our lawgivers made very little distinction between perjury by commission and perjury by omission and that they regarded wilful perjury or subornation of perjury as a grievous offence. We may note here that it was regarded as a deadly sin too. Perjurors are likened to the killers of embryo and eternal hell is said to be their future punishment. There are several *smṛti* texts describing the terrible pains and calamities that a false witness is to be subjected to after death.[2] We know that these texts or at least some of them were to be repeated by way of admonition by the judge to the witnesses when they were going to be examined in order that they might be inspired with awe. But as the bulk of the people are always very base, unprincipled, irreligious and regardless of what may or may not happen after death, perjury is sure to be committed notwithstanding all the threatenings about the future state of existence. The lawgivers being fully convinced that false witnesses were very great enemies of the state inasmuch as they hampered the course of justice the proper administration of which was considered to be the chief duty for the king, made the offence cognisable by penal justice too and thought that it deserved the severest punishment that the law could inflict. We have seen that the circumstances under which the offence was committed, the subject-matter about which it was committed

[1] येन कार्थस्य लोभेन निर्दिष्टाः कूटसाक्षिणः।
गृहीत्वा तस्य सर्वस्वं कुर्यान्निर्विषयं ततः॥—Sc., p. 217.

[2] Manu VIII. 89-101 ; Viṣ. VIII. 24-25 ; Nār. IV. 198-224 ; Sc., pp. 200-201 ; etc.

and the status of the person who committed it were also fully taken into consideration in awarding punishment. The punishment thus varied from simple fine and censure to imprisonment, banishment, confiscation of property and deprivation of life.

We may also note here that the law regarding the punishment of perjury as obtained in India does not stand in strong contrast with that of other countries. "By a still unrepealed Act of Elizabeth the punishment is a fine of £20, and in default of payment of the fine, the pillory where the offender is directed to have '*both his ears nayled.*' The same statute also disabled the offender from giving any evidence in future for ever." "The pillory has been abolished and the disability to testify has been generally considered to be abolished by the Evidence Act, 1843. The present punishment is that provided by the Perjury Act, 1728, as amended by the Penal Servitude Acts ; that is, not more than seven years' penal servitude or imprisonment." "In Scotland by Act of 1555, C. 22, perjury was punished by confiscation of movables, and by piercing the tongue to which the judge in aggravated cases might add any other penalty that the case seemed to require. There was also disability to give evidence in future and this was taken away by 15 Vict., C. 27, S. 1, and piercing the tongue has in modern times been superseded by penal servitude or imprisonment." [1]

Another rule in connection with the law of perjury is apparently so unsupportable from the ethical point of view that we cannot leave it unnoticed. It seems rather unusual that authors of the religious codes who condemn so vehemently the violation of truth in a witness should have encouraged it under certain circumstances. Manu, Gautama, Yājñavalkya, Viṣṇu, Vaśiṣṭha and Bṛhaspati all unanimously declare that perjury is permissible when the death of a member of the four castes

[1] Best on Evidence, pp, 39-41.

would be occasioned by true evidence.[1] Manu goes so far as to say that falsehood is preferable to truth in such a case.[2] Gautama qualifies his rule by saying that false evidence should not be allowed for saving the life of a sinful man.[3] Kullūka concludes from this rule of Gautama that perjury is allowable for a witness only when he becomes sure that the accused has deviated from the right course through inattention or oversight and not in the cases of great criminals like burglars and thieves.[4] Medhātithi's argument for the justification of this rule is this: when a man is sentenced to death by the true evidence of a witness who is free to say anything he chooses, the latter becomes the transgressor of the law 'one shall not kill any living being.' This commentator discusses at great length as to how a witness through whose true evidence a man is capitally punished becomes not only the means (*hetu*) but the principal agent (*prayojaka*) of killing.[5] Vijñāneśvara says that by the prohibition of speaking the truth, silence and false deposition on the part of a witness which were formerly prohibited are now enjoined. He continues to say that when in a charge based on suspicion speaking the truth will entail the death of any of the four tribes and speaking falsehood will not cause the death of anybody, there falsehood is enjoined. Where speaking truth will cause the death of either of the parties and speaking falsehood will lead to the death of a third party, there silence is enjoined if the king allows it. If the king does not allow it by any means, then a witness should render his evidence futile by contradiction. When it is also not possible, truth should be spoken. Because otherwise there will

[1] Manu VIII. 104; Gau. XIII. 24; Viṣ. VIII. 15; Yāj. II. 83; Vas. XVI. 36. For Bṛhaspati text, see Sc., p. 207.

[2] तद्धि सत्याद् विशिष्यते—Manu VIII. 104.

[3] Gau. XIII. 25.

[4] एतच्च प्रमादस्खलिताधर्मविषयत्वे न त्वत्यन्ताधार्मिकसन्धिकारसैनादिविषये तथा, गौतमः ...
—Kul. on Manu VIII. 104.

[5] Medh. on Manu VIII. 104.

be the double sin of speaking falsehood and of killing another person. Vijñāneśvara further says that in the event of speaking falsehood the penalties of perjury shall not attach to the witnesses on the facts of the case coming to light by some other means and at another time.[1]

It is realised, however, by the authorities that the sin that is generally caused by speaking falsehood arises even when a witness saves the life of a man through false evidence and hence some expiation for the sin must be done. The best expiation, according to them, is the offering of Sārasvata oblation.[2]

The license given to false testimony for a judicial purpose illustrates after all how "religious sanction has been enlisted in the cause of falsehood." This is at least whimsical if not wholly unjust. "Cases, however, in which the force of religious sanction has operated on the side of perjury even in Christian countries are neither impossible, nor without example."[3]

Miscellaneous.

It is the duty of the judge to assume a gentle look while he is engaged in hearing a case.[4] Vācaspati rightly thinks that he will easily get at the truth by not puzzling the parties.[5] The judge should neither converse with any of the parties in private, nor should he give any clue to the witnesses.[6] Helping the witnesses by giving them clues constitutes an offence according to Kauṭilya.[7] Manu enjoins that a party should not talk with

[1] Mit. on Yāj. II. 83.

[2] Manu, VIII. 105, Yāj. II. 83.

[3] Bentham's Judicial Evidence, p. 234.

[4] विनीतवेशो नृपतिः।—Sc., p. 52.

[5] तथा चानुद्धतवेशस्य राज्ञो दर्शने वादिनो न क्षुभ्यन्तीत्यतः ... तत्त्वनिरूपणं सुकरं भवति।
—Vy. C.

[6] Sc., p. 51.

[7] मतिसाहाय्यं साक्षिभ्यो ददाति ··· उत्तरमर्थे साक्षसदृशं कुर्यात्।—Kau. IV. 9.

his own witnesses secretly.[1] The intention of this rule evidently is to see that they are not tutored. According to Nārada the proof of any attempt on the part of a party to win over the witnesses of his opponents will lead to his defeat and as such he should not even converse with them.[2] A very important duty on the part of a litigant is to call in and produce the witnesses who have been cited by him. Manu and Nārada distinctly say that the judge should declare that party as having failed in the suit who saying 'I have witnesses' does not produce them though ordered to do so.[3] The loss in such an instance is evidently due to the presumption that if these witnesses were produced something fatal to his interests would have been brought to light. Medhātithi remarks that a man loses his case not only by the proofs of his opponent's contention but also by the absence of proofs in support of his own and this absence of proofs can easily be ascertained by the fact that they have not been produced though he has been repeatedly asked to do so.[4] The principle recognised seems to be that when a party has come to the court he should rely on the strength of his own proofs and not on the absence of proofs in his opponent. All such proofs are to be produced before the decision of a suit. Nārada says, "when a law-suit has been decided, evidence becomes useless."[5] "As the fertilising power of rain is thrown away on ripe grain, even so evidence becomes useless, when the suit has been decided."[6] An exception is provided, however, in the case of evidence being announced in the first stage of the trial. Thus a claimant will be debarred from producing any witness and document after the trial has been finished only if he has not announced in the first stage of the trial that

[1] Manu, VIII. 55.
[2] Nār. IV. 165.
[3] Manu, VIII. 57, Nār. II. 61.
[4] Medh. on Manu VIII. 57.
[5] I. 62. [6] I. 63.

he has them. But if having said 'I have witnesses and documents' he cannot produce them in the third stage of the trial through some unforeseen circumstances, then his case will be reviewed and the evidences accepted.[1] The sum and substance of Nārada's rule is that a party can get a review of his case on the ground that he could not produce his evidences in time provided he has mentioned them at the time of filing his complaint. According to Manu and Viṣṇu a decision obtained by false evidence may also be reviewed and set aside. They say "if it can be proved that a perjured witness has given false evidence in a suit, then the judgment is to be reversed by the judge and what has been done must be considered as undone."[2] Kullūka explains the injunction of Manu in this way :—'If it can be ascertained in the course of a trial that a witness has given false evidence then the proceedings must be stopped and if the case has been finished, it should be re-tried though sentence has been pronounced.'[3]

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[1] Asahāya on Nār. I. 62.

[2] Manu, VIII. 117, Viṣ. VIII. 40.

[3] यस्मिन् यस्मिन् व्यवहारे साक्षिभिरनृतमुक्तमिति निश्चितं भवेत् तत्तत् कार्यमसमाप्तं प्राड्विवाको निवर्त्तयेत्। यदपि च दण्डसमाप्तिपर्यन्तता नीतं तदपि पुनः परीक्ष्येत।

—Kul. on Manu VIII. 117.

CHAPTER II

Documents

Among the ancient law-books, as pointed out by Bühler, Vaśiṣṭha Dharmaśāstra is the only one that contains allusions to written documents and names them as one of the means of legal proof.[1] Gautama, Bodhāyana and Āpastamba do not make any mention of documents and bonds. Bühler attempts to explain this omission not by an assumption that in their times writing was unknown but by the consideration that judicial technicalities like the determination of the legal value of written documents had less importance in their eyes and were left either to the *deśācāra* (custom of the country) or to the Nīti or Arthaśāstra—the Institutes of polity and the Arts of common life.[2]

Though there are no details regarding documents in the code of Manu and though as a matter of fact documents are barely mentioned by name in this work, yet some clear references to documents, bonds and edicts found in it bear unmistakable evidence to the fact that they were quite familiar when the code was compiled. These references have been collected by Bühler. Here we need mention only a few of them. Verse 168 of Chapter VIII contains a reference to the documents caused to be written by force. It is enjoined that such documents will not be admissible in evidence. The expression *nibandh* is used in verse 255 of Chapter VIII. It has been taken by the commentators as meaning 'to record in writing.'[3] The purport of the verse indicates that no other

[1] S. B. E., Vol. XXV, xcix.

[2] *Ibid.*

[3] निबध्नीयात् लिखेत् (Kul.).

meaning is possible. It is stated here that when any dispute regarding the boundary of a land arises it is for the king to record the boundary together with the names of the witnesses with whose help he decides the dispute. It is thus obvious that the drawing up of a document intended to have legal force in future is meant. Medhātithi also sees in the word *anibaddha* (verse 76, Ch. VIII) a reference to the written entry of witnesses in documents.[1] The word *karaṇa* occurs in two of the verses of Manu and in both places has the meanings of documents, bonds and witnesses according to the commentators.[2] Another verse of Manu (IX. 232) mentions royal edicts (*śāsana*) which represent a kind of public documents. Here it is said that persons forging such documents should be put to death by the king. Bühler further remarks, 'the highly developed trade by land and sea on which *ad valorem* duties were imposed, the existence of official lists of prices which were renewed periodically, the complicated system of calculations of interest and the occurrence of mortgages would be impossible without written documents.[3] Kauṭilya's references to *likhita* (III. 11) as well as to *śāsana* and other varieties of royal writs (II. 10) are also good proofs for the great antiquity of Indian documents both private and public. The claims of Indian documents to a high antiquity are no less established by the exhaustive treatment of the subject by Yājñavalkya. The subject has also been fully discussed by so distinguished text-writers as Nārada, Viṣṇu, Kātyāyana, Vyāsa and Bṛhaspati who of course belong to a comparatively late period.

Vasiṣṭha has divided documents primarily into two classes : (1) *laukika* (private) and (2) *rājakīya* (official or public).[4] *Jānapada* is another name for *laukika* documents according to an

[1] धनिवद्धो लेख्यमनाबद्धः ।

[2] VIII. 152-154 करणं पत्रादि, करणं लेख्यम् (Kul.) करणं लेख्यम् (Medh.).

[3] S. B. E., Vol. XXV, ci.

[4] लौकिकं राजकीयं च लेखं विद्याद्विलक्षणम् ।—Sc., p. 125, and May., p. 15.

anonymous *smṛti* text.[1] The main distinction between a public and a private document is that the former comes from persons in authority and the latter is current among the people for transactions of business of daily life.[2]

Private Documents.

According to Viṣṇu and Nārada a private document is valid only when it does not go against the custom of the country (*deśācārāviruddham*), when its contents conform to the rules regarding pledges, sureties, bails, and the like (*vyaktādhividhilakṣaṇam*), when the order in which a document is generally written is not disturbed and when its letters are not effaced *i.e.*, illegible (*avilupta-kramā-kṣaram*).[3] As explained by the Bālambhaṭṭi, the expression *vyaktādhividhilakṣaṇam* (*lit.* answering to the rules regarding mortgages, pledges and other kinds of securities) relates to a document recording a transaction with pledge.[4] The expression *aviluptakramākṣaram* indicates that the violation of the order prescribed for a document and the effacement of letters and words affecting the sense generally had the consequence of vitiating a document. The expression *deśācārāviruddham* shows that the *deśācāra* prevailing in each country in regard to the validity of a document was never to be ignored. Now what is actually implied by *deśācāra* in relation to a document ? Asahāya understands the expression rather in an unusual sense. He says that the writing which does not record a gift of something not fit to be given or a disposition in regard to a minor is *aviruddha* (*lit.* not adverse)

[1] लौकिकं जानपदं, तथा च संग्रहकारः—राजकीयं जानपदं द्विविधं लिखितं स्मृतम्।
—Sc., p. 125 ; May., p. 15.

[2] राजकीयं राजत शासनम् लौकिकं लोकव्यवहारार्थम्।—V.-loka in manuscript.

[3] Viṣ. VII. 11, Nār. IV. 136.

[4] सवन्धकव्यवहारविषयमिदम्।—Bālam. on Mit. on Yāj. II. 89.

to the *deśācāra* (usages of the country).[1] Now it is a matter of common knowledge that not to give anything not fit to be given and not to allow a property to be disposed of by a minor cannot constitute a peculiar custom of any country and these are rules promulgated by common law as applicable everywhere. Mitramiśra quotes the verse *deśācāra*, etc., in support of the contention that the prohibition of the use of local dialects does not apply to private documents.[2] But he does not explicitly say which are the words in this verse conveying directly or indirectly such a sense. The Mitākṣarā raises the question of the use of local dialects in course of the explanation of *aviluptakramākṣaram*. This commentary says that though the apparent meaning of this expression is that a document is valid and makes proof only when its import and language are free from breaks and obscurity and when at the same time there is no erasure or effacement of letters, yet what it really signifies is that the use of refined language is not compulsory in private documents as in the case of royal edicts.[3] Thus the expression *deśācārāviruddham* contains no reference direct or indirect, according to this commentary, to the language to be used in documents. Some light is thrown by Devaṇabhaṭṭa on the matter referred to by *deśācāra* in regard to a document. He seems to suggest that it may refer to the mention of the name of the day on which the transaction takes place or to the number of witnesses to be employed for attestation.[4] It goes without saying that many other formalities and peculiarities which are merely local are also referred to by the term *deśācāra*. Whatever might be the precise significance of *deśācāra* in relation

[1] तदिह यल्लेख्यमदेयदानालेखनेनास्वतन्त्रोपरिलिखितादिना च देशाचाराविरोधेन वर्णितं तद्देशाचाराविरुद्धम् .—Asahāya on Nār. IV. 130.

[2] तस्मिन्निव लौकिकदेशभाषादि नेत्याह नारदः ।—Vīram., p. 193.

[3] Mit. on Yāj. II. 89.

[4] आदिशब्देन देशाचारावाप्तवारादि गृह्यते ।—Sc., p. 133.

साक्षिसंख्यानियमः ··· स यस्मिन् देशे यथैवाचारस्तथैव याह्यः ।—Sc., p. 134.

to the rules of writing there is no doubt that it had always to be respected at the time of executing a bond. Kātyāyana distinctly says that the non-observance of *deśācāra* or local usage in drawing up a document is one of the causes which vitiate it.[1] Thus it becomes perfectly clear that the evidence of usage was admitted even at an early period to prove the validity of a document.

According to Bṛhaspati private documents are of seven classes, *viz.*, *bhāgapatra* (a deed of partition), *dānapatra* (a deed of gift), *krayapatra* (a deed of purchase), *ādhānapatra* (a deed of mortgage), *saṁvitpatra* (a deed of agreement), *dāsapatra* (a deed of bondage) and *ṛṇapatra* (a deed of debt).[2] Vyāsa classifies them into eight kinds *cīraka* (a document written by the *pauralekhaka*—city scribe), *svahasta* (a document written by the obligor), *upagata* (a document written by the obligee), *ādhipatra* (a deed of pledge), *krayapatra* (a deed of purchase), *sthitipatra* (a deed of agreement), *viśuddhipatra* (a deed of purification) and *sandhipatra* (a deed of reconciliation).[3] The Smṛticandrikā rightly observes that neither of these classifications is exhaustive. Bṛhaspati omits to mention *sīmāvivādapatra* (a deed recording the settlement of boundary disputes) and Vyāsa ignores *vibhāgapatra* (a deed of partition). In fact the use of the expression *ādi* in Bṛhaspati's text indicates that complete enumeration has not been made by him and there are other kinds of documents also.[4] Vyāsa's classification is unsound also for the reason that it has not been done on a uniform basis. The classification of documents into *cīraka*, *svahasta* and *upagata* proceeds on one basis, namely, according as it is written

[1] देशाचाराविरुद्धं यत्।—Sc., p. 141. Aparārka reads कृतमस्वामिना यच्च for कृतं च स्वामिना यच्च in the verse. See Aparārka on Yāj. II. 89.

[2] May., p. 16. [3] Sc., p. 135.

[4] नात्र संख्या विवक्षिता, विभागपत्रादेरपि लौकिकत्वात्।—Sc., p. 135.

अत्रापि (व्यासवचनेऽपि) न संख्या विवक्षिता, अधिकानामपि लेख्यानामेतेभ्यो दर्शितत्वात्। अतएवादियहणं कृतम्। अन्यथा गणितैरेव सप्तविधत्वसिद्धेरादियहणमपार्थं स्यात्।—Sc., pp. 136-37.

by the professional scribes, the obligor or the obligee and the classification into other five kinds has been done on quite another basis, namely, according to the subject-matter. So instead of saying that documents are of eight kinds, Vyāsa should have rather said that from one point of view they are of three kinds and from another they are of five kinds.

A document is termed *cīraka* when it is written by the city-scribe (*pauralekhaka*) and attested by subscribing witnesses.[1] It should be noted here that though *jānapada* is the name applicable to all private documents whether *svahasta* or *anyakṛta*, yet more technically the term applies to those documents only which are written by scribes of well-known places or of high official positions and properly attested by witnesses.[2] The *anyakṛta* document of Nārada and *sthānakṛta*[3] document of Bṛhaspati also are those which are written by others, *i.e.*, professional scribes and attested by witnesses. So practically there is little distinction between *cīraka*, *jānapada*, *anyakṛta* and *sthānakṛta* documents. They are all to be written by persons other than the parties and attested by witnesses. A *svahasta* document on the other hand is in the handwriting of the obligor himself and requires no attestation.[4] The peculiarity of a *svahasta* document, as pointed out by Yājñavalkya, is that it has the advantage of being valid even without attesting witnesses,[5] evidently owing to its directly proceeding from the party against whom it is to be used. Jīmūtavāhana comments that such a document also

[1] Sc., p. 135.

[2] लिखेज्जानपदं लेख्यं प्रसिद्धस्थानलेखकः। ··· लेख्यं तु साक्षिमत्।—Sc., p. 132.

[3] राजलेख्यं स्थानकृतं स्वहस्तलिखितं तथा।—May., p. 15.

The term 'written in a particular place' (स्थानकृत) seems to relate to documents, written by a professional scribe and attested by subscribing witnesses.—S. B. E., XXIII, p. 334 fn.

[4] याज्ञवल्क्य स्वहस्तेन लिखितं साक्षिवर्जितम्। स्वहस्तलेख्यं विज्ञेयं प्रमाणं तत् स्मृतं बुधैः।
—Kāt. in Sc., p. 136.

[5] Yāj. II. 89.

if attested is placed on a safer footing.[1] Mitramiśra says that it is to the interest of the obligee to have it attested.[2] An *upagata* document has been defined as one written by the obligee with the consent of the obligor.[3] In all probability attestation was essential to such a document though authorities do not say anything about it. We know it from Kātyāyana, however, that the *upagata* documents are very risky. It is laid down by him that if the debtor being sued says that the document was written without his consent, then the creditor speaking by it will have first of all to take the burden of proving that the requisite consent was given at the time of its execution and in the event of his failure to prove it the document will be regarded as a forged one and will have no effect as proof.[4]

We meet with some texts attributed to Vyāsa which set forth the relative weight of the diverse kinds of documents.[5] These texts declare that a *nṛpaśāsana* is superior to *jānapada*, and a *jānapada* [6] to *svahasta* with witnesses, and a *svahasta* with witnesses to a *svahasta* without witnesses. Devaṇabhaṭṭa adds that a *svahasta* without witnesses is superior to an *upagata*.[7] He further dissolves the compound *nṛpaśāsanam* into *nṛpāt śāsanam* and comments that *nṛpa* signifies by *lakṣaṇā* all kinds

[1] विनापीति स्वहस्तलिखितस्य ससाक्षिकस्य प्रामाण्यमविवादमिति ।—Vm., p. 334.

[2] परन्तु स्वलिखितसंशयसंभावनायां तदुद्दासाय साक्षिमत्तदपि कार्यम् ।
—Mitramiśra on Yāj. II. 89.

[3] एवमेव दायकेन लिखितं याचकैषाभ्युपगतं लेख्यमुपगताख्यम् विज्ञेयम् —Sc., p. 136.

[4] धनिकेन स्वहस्तेन लिखितं साक्षिवर्जितम्। भवेत् कूटं न चेत् कर्ता कूटं ह्रीति विभावयेत् ॥
कर्ता धनिकोऽधमर्णानुमत्या कृतमिति यदि न विभावयेत् न साधयेत् तदा न जानामीत्यधमर्णेन दूषितं तल्लेख्यं कूटं भवेदित्यर्थः ।—Vīram., p. 197; Sc., p. 143.

[5] Vm., p. 338.

[6] By the term जानपद must be understood a document other than what is in the handwriting of the obligor. जानपदेनात्र स्वहस्तकृतादन्यदुच्यते ।
—Sc., p. 150.

[7] अतएवोपगताख्यलेख्यादधिकम् स्वहस्तकृतम् ।—Sc., p. 150.

of public documents other than *śāsana*.[1] What he means to say is that a *śāsana* or royal edict is more reliable than the rest of the public documents. Thus if the following classification of documents be made, each preceding class will be superior to each of the succeeding classes :—

1. *Śāsana*.
2. Other public documents.
3. *Jānapada*.
4. *Svahasta* with witnesses.
5. *Svahasta* without witnesses.
6. *Upagata*.

It should be noted here that the greater reliability or superior worth of a document has been determined according as it has the less possibility of being tampered with or forged.[2]

A *jānapada* document (*i.e.*, a private document written by a reputed scribe) is to contain the name of the reigning king and a description of his *vaṃśa* (dynasty). Special care should be taken that the traditional order of writing a document is kept up and the local usage observed. It should also be specifically dated—the year, the month, the fortnight as well as the day on which it is framed should be mentioned in it.[3] A deed of debt, according to Yājñavalkya, besides specifying in details the date of the transaction, should be provided with such particulars about the parties as their names, the names of their fathers, their tribes and families and the scholastic titles such as *bahvṛcha* or *kaṭha* assigned as a mark of distinction for reading some portion of the Vedas.[4] Vaśiṣṭha and Vyāsa enjoin

[1] नृपशब्देनात्र लक्षणया शासनेतरद्राजकीयं, तेनान्यकृतं स्वहस्तकृताद्बलवत्, तस्मादपि राजकीयं, ततोऽपि शासनमित्यर्थः।—Sc., p. 151.

[2] बलवत्त्वं चोत्तरोत्तरस्य कूटत्वासम्भवतारतम्यतोऽवबोध्यम्।—Sc., p. 150.

[3] राजवंशक्रमयुतं वर्षमासार्धवासरैः (Vyāsa).
अविलुप्तक्रमाचारं देशाचारस्थितियुतम् ... etc.,—Nār. in Sc., pp. 132-133.

[4] Yāj. II. 85.; सत्रब्रह्मचारिकं बह्वृचादिशास्त्राध्युक्तं गुणनाम। बह्वृचः कठ इति—Mit.

that such a document should bear the sign-manual of the obligor and be attested by two witnesses.[1] It is further enjoined by Vaśiṣṭha that in a deed of debt should be mentioned also such other details as the country and place of residence of each of the parties, the particular branches of Vedic lore they belong to, the things borrowed or pledged, their kinds and number and rate of interest to which both the parties agree.[2] Vijñāneśvara and Aparārka remark that these particulars or most of them are covered by the term *ādi* in Yājñavalkya's text.[3] The Śukranīti lays down that private documents relating to gift, sale and purchase of immovable property are valid only when they are executed with the consent of co-sharers and attested by the headman of the village or the like.[4]

Yājñavalkya states that the signature of the debtor should be put below the contents of the document and it should be accomplished with the words 'I, son of such and such, agree to what has been written above.'[5] Each of the witnesses also should write with his own hand, after specifying the name of his father, 'I being such a one am a witness to this matter.'[6] The scribe should put his signature at the end and write 'I, son of so and so, have written this document being solicited by both the parties.'[7] He should put his *svahasta* or sign-manual as well.[8] Nārada says that when the debtor does not know how to write, he should cause another person to write his assent in presence of all the witnesses. When a witness cannot write,

[1] याहकहस्तं च विदितार्थं च साक्षिणो—Vas. in Vīram., p. 191.
ऋणिहस्तं नामयुतं साक्षिभ्यां पितृपूर्वकम्—Vyāsa—Sc., p. 134.

[2] स्थानं निवसनं तथा ... । जातिं गोत्रं च शाखां च द्रव्यमानं ससंख्यकम् । इडिम् ···
Vīram., p. 191.
'द्रव्यभेदप्रमाणञ्च इडिधीभयसम्मताम्—Sc., p. 132.

[3] आदिग्रहणाद् द्रव्यजातिसंख्यावारादेर्ग्रहणम्—Mit. on Yāj. II. 85.
आदिशब्देन धनस्य जातिसंख्यापरिमाणादीनां ग्रहणम्—Aparārka on Yāj. II. 85.

[4] Suk. IV. 6. 76. [5] Yāj. II. 86. [6] Yāj. II. 87.
[7] Yāj. II. 88. [8] Vyāsa in Sc., p. 135.

he should cause the fact of his being a witness to be written by another witness or a different person and this also should be done before all other witnesses.[1] Devaṇabhaṭṭa remarks that when a debtor or a witness happens to know a foreign script and not the one in which the document is written, he may put his signature in the script he is familiar with. He quotes Kātyāyana as an authority in whose opinion all local scripts may be used in a document.[2]

As to the number of witnesses to be employed for attesting a document, there seems to have been no fixed rule. The texts of Hārīta, Vyāsa and Vaśiṣṭha enjoining the attestation of private documents use dual number in the word *sākṣin*[3] and hence it seems probable that two witnesses were generally deemed sufficient for the purpose of attestation. The main text on the subject is, however, that of Yājñavalkya. This text uses the word *sākṣin* in plural number. A good deal of discussion has centred round it and we quote the text below :—

साक्षिणश्च स्वहस्तेन पित्रनामकपूर्वकम् ।
अत्राहममुकः साक्षी लिखेयुरिति ते समाः ॥ [4]

Viśvarūpācārya reads *asamāḥ* and says that the expression means *three*.[5] He discards the reading *samāḥ* on the ground that neither of its meanings two or any multiple of two will be applicable here. It cannot mean *two* because such a meaning will be inconsistent with the plural number in the word *sākṣin*.

[1] अलिखिश्च ऋणी यः स्यात् लेखयेत् स्वगतं तु सः ।
साक्षी वा साक्षिणान्येन सर्वसाक्षिसमीपतः ॥—Vīram., p. 191 ; Sc., p. 134.
Vm. attributes this verse to Vyāsa.

[2] विजातीयलिपिज्ञोऽपि स्वयमेव लिखेत् लिपिज्ञत्वात्—सर्वान् जानपदान् वर्णान् लेख्ये तु विनिवेशयेत् इति कात्यायनस्मरणाच्च ।—Sc., pp. 134-135.

[3] उत्तमर्णाधमर्णौ च साक्षिणौलेखकस्तथा (Hārīta) साक्षिद्वयं नामयुतं साक्षिभ्यां पित्रपूर्वकम् (Vyāsa)—Sc., p. 134.

[4] Yāj. II. 87.

[5] असमास्तय इत्यर्थः ।

It cannot also mean a multiple of two, such as four, because it would go against the *smṛti* text which distinctly says that the number three is to be considered best in connection with witnesses for attesting a document.[1] Vijñāneśvara accepts the reading *samāḥ* but seems not to take it as referring to the particular number of witnesses for attestation. According to him the term signifies equality in point of number and qualifications.[2] His explanation is thus quite vague. He is, however, followed by the author of the Mayūkha.[3] Aparārka follows Viśvarūpa in accepting the reading *asamāḥ* but expresses the opinion that it does not positively signify *three* but simply an odd number such as three, five, seven, etc.[4] This explanation is perhaps based on the consideration that truth may even be ascertained from the statements of the majority of witnesses in the case of discrepancy in their evidence. Jīmūtavāhana, Vācaspati and all other later digest-makers accept the reading *samāḥ* and thus according to them the number is to be any multiple of two. Devaṇabhaṭṭa comments that the plural number used by Yājñavalkya in the word *sākṣin* does not indicate that there should be more than two witnesses to attest each and every document. Many witnesses may be necessary in the case of important documents only. He points out that a document written by another (*anyakṛta*) is generally called five-membered taking the creditor, the debtor, the scribe and two witnesses into account.[5] He naturally prefers the reading *samāḥ* and

[1] अन्ये तु समा इति छेदशान्त्या द्वावित्याहुः। तत्तु बहुवचनविरोधादयुक्तम्। न च चतुरभिप्रायं तदिति युक्तम्। "लेख्ये तु परमास्त्रयः" इति वचनात्।—Bālakrīḍā on Yāj. II. 87.

[2] समाः संख्यातश्च गुणतश्च कर्तव्याः।

[3] समाः संख्यातो गुणतश्च ... —p. 17.

[4] ते चासमा विषमसंख्याका भवन्तीत्यर्थः।

[5] उत्तमर्णाधमर्णौ साक्षिणौ लेखकस्तथा। समवायेन चैकैषां लेख्यं कुर्वीत नान्यथा॥

एवं चान्यकृतलेख्यस्योत्तमर्णाधमर्णसाक्षिद्वयलेखकरूपपंचपुरुषारूढत्वात् पंचारूढं पत्रमिति लोके व्यवहारः ... —Sc., p. 134.

takes it to mean *two*, evidently ignoring the plural number used.[1] He leaves after all the question of the number of witnesses to be employed for attesting a document to be decided finally by local usage.[2]

A very important thing in connection with the execution of a document is that great care is to be taken in the matter of selecting its scribe and the witnesses who are to subscribe to it. According to Kātyāyana a document is spoiled through the blemishes of the scribe and of the witnesses.[3] Vyāsa also says that a document may well be considered as forged if it is found that any of the witnesses who have subscribed to it or the scribe who has written it is of wicked disposition or of vicious habits.[4]

There are some *smṛti* texts which show that our law-givers were fully alive to the necessity of providing for what purported to be the copies of documents under certain circumstances with a view to admitting them in evidence in future. These texts thus illustrate that anciently the secondary evidence of a transaction in the shape of the copy of a document could be admitted when the primary evidence thereof, *i.e.*, the document itself was not available. The texts are as follows :

देशान्तरस्थे दुर्लेख्ये नष्टोन्मृष्टे हृते तथा ।
भिन्ने दग्धेऽथवा छिन्ने लेख्यमन्यत्तु कारयेत् ॥[5]

'When a document is in another country, when its writing is bad (in consequence of the characters or words being written in a corrupt, equivocal or unintelligible manner), when it is

[1] साक्षिण इति बहुवचनं गुरुतरकार्यलेख्यविषयम् ... —Sc., p. 134.

[2] स यस्मिन् देशे यथैवाचारस्तथैव याह्यः, नान्यत्र स्वरसार्थत्वात्—Sc., p. 134.

[3] साक्षिदोषाद् भवेद् दुष्टं पत्रं वै लेखकस्तथा—Apar., p. 686.

[4] दूषितो गर्हितः साक्षी यत्रैकोऽपि निवेशितः ।
कूटलेख्यं तु तत्प्राहुः लेखको वापि तादृशः ॥—Sc., p. 132.

[5] Yāj. II. 91.

lost, when its writing is effaced (on account of the ink having become pale), when it is stolen by thieves, when it is torn, burnt or split into two—under any of these circumstances another document has to be executed.'

छिन्नभिन्नहृतोन्मृष्टनष्टदुर्लिखितेषु च ।
कर्तव्यमन्यल्लेख्यं स्यादेष लेख्यविधिः स्मृतः ॥[1]

'If a document is split, torn or stolen, if its writing is effaced, if it is lost or badly written, a fresh document should be executed.'

मलैर्यद् भेदितं दग्धं छिद्रितं वोतमेव वा ।
तदन्यत्कारयेल्लेख्यं स्वेदेनोल्लिखितं तथा ॥[2]

'When a document is split by dirt, when it is burnt, perforated or lost or when its letters are obliterated by the sweat (of the hand), a new document should be executed.'

Asahāya remarks that when a document meets with any of the diverse accidents mentioned, the party by whom it was executed may be compelled to give another document in its place.[3] Vijñāneśvara says that a document may be renewed under any of these circumstances only if both the parties agree.[4]

Another verse of Nārada deserves to be noticed in this connection. We know from this verse and the interpretation put upon it that our law-makers and jurists recognised the principle that proper search is to be made for the primary or original evidence of a transaction, namely, the document itself, before receiving secondary evidence thereof in the shape of oral testimony of witnesses. This verse further informs us that the secondary evidence of a transaction was receivable

[1] Nār. IV. 146.

[2] Kāt. in Aparārka, p. 687 ; Sc., p. 138.

[3] ... तेनावश्यमेव करणीयमन्यल्लेख्यं स्यात् ... —Asahāya on Nār. IV. 146.

[4] एतच्चार्थिप्रत्यर्थिनोः परस्परानुमतौ सत्याम् ।—Mit. on Yāj. II. 91.

only when sufficient excuse could be given for the non-production of primary evidence and that the excuses which the law allowed for dispensing with primary evidence were that the document was destroyed or lost, or that it was in a condition which made it quite worthless and unfit for use, or that it could not be procured owing to its being at a far distant or inaccessible place. The verse runs as follows :

लेख्ये देशान्तरन्यस्ते दग्धे दुर्लिखिते हृते ।
सतस्तत्कालहरणमसतो द्रष्टृदर्शनम् ॥[1]

'In the event of a statement made to the effect that a document lies deposited in a place remote from the scene of litigation or that it is burnt or that its writing has been obliterated or that it has been stolen, the tribunal will grant time for its production, provided it is still in existence; when, however, it becomes certain that the document is no longer in existence then the decision should be arrived at from the evidence of the attesting witnesses who subscribed to it.'

Vijñāneśvara explains that the rule about the allowing of time for the production of a document is to apply only if it is in existence and at a place from which it is possible to procure it. He further says that the time to be allowed must be calculated with reference to distance of the place at which the document is alleged to be. When, however, it is in an inaccessible place or has met with any of the accidents mentioned then the decision should be arrived at by having recourse to the oral testimony of witnesses.[2] He seems also to remove the apparent inconsistency between this verse and those quoted above by saying that the rule enunciated in the present verse

[1] Nār. IV. 142.

The Mitākṣarā reads कालकरणम् and explains it as कालावधिः ।

[2] देशान्तरस्थपत्रानयनायाधापेक्षया कालो दातव्यः । दुर्दशावस्थिते नष्टे वा पत्रे साक्षिभिरेव व्यवहारनिर्णयः कार्यः ।—Mit. on Yāj. II. 91.

is to be observed when the parties object to the execution of a new bond on the destruction or loss of the old one.[1] Devaṇabhaṭṭa takes a more reasonable view. He says that obviously the rule in the verse of Nārada under discussion is to apply when the debtor is ready to pay off the debt and thus when the execution of a new bond becomes useless even if the parties agree to it. He apparently thinks that the utility of a document lies in preserving the remembrance of a transaction and hence when a document is destroyed or lost or becomes unavailable a new one should be created in its place only if the debtor does not make payment immediately but proposes to do it afterwards.[2]

Asahāya observes that the rule of Nārada may apply in a lawsuit to both the plaintiff and the defendant.[3] Thus when the creditor after suing the debtor cannot produce the document to prove his point, the judge shall give him a reasonable period of time to search for it and produce it. If the creditor says it cannot be found on account of its being destroyed by fire or by a similar accident, he should be asked to prove its contents by the aid of the *draṣṭṛs* (*i.e.*, the witnesses who attested the bond or the scribe who wrote it or any third party who was present at the time of its execution). In like manner the debtor also when asked to discharge a certain debt on the strength of a bond signed by himself may take the following plea : "It is true that I had written this bond. The money, however, was not handed over to me. The bond was not torn though it lay by my side through carelessness. The father of the claimant said to me after a few days 'the bond for which money was not taken by you was left by me outside through

[1] विमत्यां तु—Mit. on Yāj. II. 89.

[2] तत्तदैव धनदानोद्यतऋणिकविषयम्। तत्र लेख्यान्तरकरणे प्रयोजनाभावात् ... कालान्तरे तु धने देये लेख्यान्तरं कार्यमेव अतएवोक्तं तेनापि (नारदेनापि) ... छिन्नभिन्नदग्धनीम्नष्ट ... Sc., p. 139.

[3] अस्य श्लोकस्यार्थः द्वयोरपि वादिप्रतिवादिनोः सोपयोगः, etc., Asahāya on Nār. IV. 142.

negligence because I thought it was of no use. I have not been able to find it out with great attempt even ; I shall give you a letter of acquittance.' Having said thus the father of the creditor gave me such a letter which I kept in a box at such and such a place.'' In case the plea taken by the defendant be of this kind, the judge shall give him time to produce the letter of acquittance. If he says that it is no longer in existence he must prove the fact of its having been given to him by means of the testimony of witnesses.

When there are no witnesses, the case should be decided by having recourse to ordeals according to the Mitākṣarā. Here the general rule that recourse must be had to a divine test when there is no writing or witness will apply.[1]

It has been noticed above that a document is considered to be false when it is proved that its scribe or any of the witnesses is or was a man of bad character. There are other causes also which vitiate a document. It is said that a document is null and void when it is obtained by force, fraud, coercion, or intimidation, or executed by a person intoxicated, or by one charged with a heinous crime such as the murder of a Brāhmaṇa or by a woman or by a child or by one not independent, or by one who is diseased, insane, addicted to vice or about to die.[2] Thus the grounds on which documents may fail to have any legal effect may be mainly classed under four heads : (1) sinfulness and want of competency on the part of the person who gives the bond, (2) want of capacity on his

[1] यदा तु साक्षिणो न सन्ति तदा दिव्येनैव निर्णयः कार्यः। अलेख्यसाक्षिके दैवी व्यवहारे विनिर्दिशेदिति स्मरणात्—Mit. on Yāj. II. 91.

[2] Nār. IV. 139. Asahāya reads मत्ताभियुक्त for मत्ताभियुक्त,

मत्तेनोपधिभीतेन तथोन्मत्तेन पीडितैः।
स्त्रीभिर्बालास्वतन्त्रैश्च कृतं लेख्यं न सिध्यति ॥—Kāt. (So., p. 141).

सुमूर्षुणाभियुक्तेनस्त्रीमत्तव्यसनातुरैः।
निरुपधिबलातुकारकृतं लेख्यं न सिध्यति ॥—Aparārka, p. 686.

part to weigh the consequences of his own act, (3) absence of any intention in him to execute the bond, and (4) want of his freedom at the time of its execution. The law declares that not only a writing but all actions induced by force are void of legal effects. Thus a gift caused to be made or a possession caused to be delivered by the use of force will not be binding upon the donor or the owner of the property. The conclusion on the whole seems to be that when it is found that a document was not executed with the free consent of the obligor or that the frame of his mind was such as did not possibly allow him to weigh his act and come to a decision about it, then such a document will have no effect as proof.

Nārada further lays down that a document ceases to be valid when the witnesses, the creditor, the debtor and the scribe are all dead.[1] Asahāya observes that this rule is based upon the consideration that such a document may easily be suspected as a forgery.[2] Nārada adds that if the claimant (a descendant of the original creditor) can show that a pledge is in existence and it is in his possession then the document will retain its validity even after the death of the scribe, the witnesses, the debtor and the creditor.[3] It must be proved, however, to the satisfaction of the court that the pledge is being actually enjoyed. A mere mention of it without the proof of actual enjoyment will have very little weight establishing the validity of a document.[4] According to Kātyāyana twenty years' enjoyment of such a pledge is a sufficient proof for the genuineness of the document. He says, 'if on the strength of a document a pledge is enjoyed for twenty years

[1] Nār. IV. 138.

[2] अन्यथा तादृशैः पत्रैर्जनस्य कूटप्रपंचकृतैः विश्वासः सम्भवति।
—Asahāya on Nār. IV. 138.

[3] न चेदाधिः स्थिरान्वयः—Nār. IV. 138.

[4] ततो भोगेन विना तयोर्लिखितमात्रादिचिह्नयोरपि सिद्धिरपि नास्ति।
—Asahāya on Nār. IV. 139.

without any protest from the debtor, that document will be considered to have been duly executed and will require no further proof to establish its validity.'[1] The period of limitation has been fixed to be twenty years in the case of *sīmā-vivādapatra* as well.[2] It is laid down by Bṛhaspati that when a dispute about the boundary line is settled and the decision recorded in a document, that document will be regarded as conclusive if there is no protest from anybody within twenty years. According to another text the validity of a deed of debt may be established by the proof of enjoyment of a pledge even for a short period.[3] The actual enjoyment of a pledge by the creditor is quite in consonance with the spirit of the Hindu law of pledge. Both Nārada and Bṛhaspati recognise the division of pledge into two classes, *e.g.*, *gopya* (a pledge for custody) and *bhogya* (a pledge for use).[4] A document though unaccompanied by any pledge will remain valid, however, according to Nārada, even after the death of the witnesses and all other persons concerned with it, provided it can be proved that it has been shown to the original debtor or his descendant whenever interest became due or that it has been read out publicly or that the repayment of the debt recorded in it has been occasionally urged.[5] The practice of showing a document to special people and reading it out to them is advocated by Bṛhaspati also. It was undoubtedly meant to give publicity to a document and thus to inform people of its existence and contents. We may read Bṛhaspati's text with interest—'let a man show a document on every occasion to meetings of families, associations of traders, assemblies of

[1] Aparārka, p. 690.

[2] *Ibid.*, p. 691.

[3] Sc., p. 147.

[4] Nār. IV. 125. गोप्यो भोग्यश्चयैव च, Br. in Viram., p. 305.

[5] Nār. IV. 140, see also Aparārka, p. 691, and Sc., p. 147.

cohabitants and other bodies of persons and read it out to them, and remind them of it, in order to establish its validity.'[1] To follow this practice was not merely a matter of option to the holder of a document but incumbent upon him. We learn from Bṛhaspati and Vyāsa that the non-observance of it on the part of the creditor could even be fatal to his interests. Bṛhaspati distinctly says that a document loses its validity not so much by the evidence of witnesses tendered by the opposite party or the proof of ordeal resorted to by him, as by the negligence on the part of the creditor to occasionally show it and read it out.[2] Vyāsa says that when the debtor and the creditor are both dead, a document not accompanied by pledge will be considered invalid if the defendant can prove that it has neither been seen nor heard of for a long time.[3] Kātyāyana fixes a definite period within which a document must be shown or read out and lays down that a document not heard of or seen within such a period will certainly become invalidated notwithstanding the fact that all the attesting witnesses are living. The period fixed by him is thirty years.[4] Nārada's view also is that attesting witnesses will be of no help to establish the validity of a document which is unknown or has never been heard of before.[5] Kātyāyana fixes a period of limitation to run against the defendant and not against the plaintiff. He declares that a document will be enforceable

[1] कुलदेवीगणादीनां यथाकालं प्रदर्शयेत् ।
दर्शयेत् स्मारयेच्चैव यथा स्याद् बलवत्तरम् ॥—Viram., p. 200.

[2] न जातु क्षीयते लेख्यं साक्षिभिः प्रत्ययेन वा ।
अदर्शनात्साधितार्था हानिं प्राप्नोत्युपेक्षया ॥—Sc., p. 151.

[3] अदृष्टासाक्षिकं लेख्यं प्रमीतधनिकार्थिकम् ।
अवस्कन्दप्रदं चैव बहुकालं न सिध्यति ॥—Aparārka, p. 692.
Sc. reads अवहस्तप्रदम् and explain it as साक्षिप्रतिभूरहितम् ।—p. 151.

[4] Pds., p. 135.

[5] Nār. IV. 141.

and the defendant will lose his right of action to nullify it, or in other words, his remedy in respect of it will be barred if he has failed to take any exception to it during a period of twenty years though its defects are glaring.[1] These rules of limitation after all rest on the doctrine of presumption as well as on the broad ground of expedience and justice. When the plaintiff withholds his document from the public for a long time, there is no need to say that he loses the benefits that could be derived from it on account of his wilful disregard of the rule prescribed for giving it a publicity but that his loss is due to the presumption that the document is spurious. When on the other hand the defendant remains silent for a considerable period of time regarding the defects of a document which are quite apparent, there is no reason to presume that his remedy is barred owing to the supposition that he has a general acquiescence in the matter of the document; it will be sufficient to say that he is made to suffer for his negligence or indolence. Other grounds on which the validity of a document may be doubted have been mentioned by Bṛhaspati. Thus when a loan recorded in a bond has not been expressly claimed from the debtor who has means enough to discharge it and is at hand, the bond loses its validity on account of the presumption that the debt has been paid.[2] A similar presumption will arise from the absence of any demand on the part of the creditor to have his loan restored even after it has ceased to yield interest, *i.e.*, when the interest has ceased on its being equal to the principal.[3]

[1] हृष्टे पत्रे अदृष्टं दोषं नीक्षयान्धिको यदि ।
ततो विंशतिवर्षाणि ज्ञात्वा पत्रं स्थिरं भवेत् ॥—Viram., p. 200.

[2] याचश्च निकटस्थश्च यच्छक्तेन न याचितम् ।
यद्वर्षसप्तया तच्च लेखां दुर्बलतामियात् ॥—Aparārka, p. 692.

[3] ऋणे ज्ञातमि तु लिखितं धी न दर्शयेत् ।
न याचते च यत्किंचित् तत् सन्देहमवाप्नुयात् ॥—Aparārka, p. 692.
Pds. reads the *śloka* differently, p. 135.

The law affords sufficient protection, however, to those who cannot protect their own interests. Thus we see it laid down that the validity of a document will not suffer on any of the above grounds if the holder thereof is an insane person, an idiot, a minor or one who has absconded through fear of the king, a bashful person or one oppressed with fear.[1]

Besides these invalidating circumstances there are *doṣas* (blemishes and imperfections) for which also the genuineness of a document may be called in question. Kātyāyana and Bṛhaspati lay down that all objections regarding a document produced to prove something must be taken when evidence is offered. Bṛhaspati distinctly says that such objection cannot be taken subsequently.[2] The intention of the rule is obvious. It is to prevent protracted litigation and delay in the administration of justice. We know further from Kātyāyana that the blemishes (*doṣa*) of a document are of two kinds, *gūḍha* (latent or hidden) and *prakaṭa* (apparent) and that the former kind is to be pointed out by the defendant and the latter kind to be taken cognisance of by the tribunal.[3] The invalidating circumstances also, we may assume, had to be brought to the notice of the tribunal by the defendant. As to the exact significance of the expression latent defects (*gūḍhadoṣa*) in relation to a document we should look to other texts. These texts go to show that they are the defects which are not apparent on the face of a document but caused by the fact of its witnesses, scribe and owner being

[1] उन्मत्तजडबालानां राजभीतिप्रवासिनाम्।
अप्रगल्भभयार्तानां न लेख्यं हानिमाप्नुयात्॥—Viram., p. 198.
Sc. reads राजभीतप्रवासिनाम्, p. 152. See also Pds., p. 135.

[2] Sc., p. 142.

[3] प्रमाणस्य हि ये दोषा वक्तव्यास्ते विवादिना।
गूढाः स्युः प्रकटाः सभ्यैः कालशास्त्रप्रदर्शनात्॥—Pds., p. 135.
Sc. reads गूढास्तु and कालि शास्त्रप्रदर्शनात्।—p. 142.

all dishonest persons and thus giving wide scope for the suspicion that it has been fabricated or forged, or by the fact of its attestation and writing not being done by those persons whose names are on it as witnesses and scribe.[1] So bringing out *gūḍhadoṣa* of a document consists in nothing but impeaching its genuineness on the ground of bad character of the persons concerned with its execution or the names of the scribe, witnesses and obligor being all forged. Thus the defendant might attack the document against him in the following manner. "The scribe, the witnesses and the plaintiff are all men of questionable character; the document in question is not genuine but has been fabricated by them in collusion with each other," or, "the document is a false one, I am sure it is not in the handwriting of the person mentioned as scribe in it; it has neither been attested by those who appear as witnesses, nor is the subscription that seems to be mine really so." When the genuineness of a document is called in question in this manner, it is for the plaintiff to clear up all doubts about it. If he cannot, the utter worthlessness of the document will be established.[2] The law provides further that the plaintiff failing to prove the genuineness of the document relied on by him will be severely punished—his punishment is to be as heavy as the highest amercement.[3] In a case relating to immovable property, pledge or sale the punishment is to be even heavier, *e.g.*, the deprivation of his tongue, hands and feet.[4] It cannot be denied that by placing the burden of proving the genuineness of a document on the plaintiff the law gives the defendant a position of which he may take undue advantage

[1] Viram., p. 199, and Sc., p. 142.

[2] तच्च यदीतरेषु ते दोषा न परिहृतास्तदा दुष्टं लेख्यम्। परिहृतायेददुष्टम्।—Sc., p. 143.

[3] Sc., p. 150. Viram.'s reading of the verse is evidently bad, see p. 199.

[4] Sc., p. 150. Pds. reads यस्मग् भावित: for स सम्यग् भावित: in the second line of the verse, p. 138.

by making all sorts of reckless allegations against it. There is some safeguard, however, devised against his falsehood and misrepresentation. A text of Kātyāyana seems to imply that if the defendant's charges prove to be false, he will also be punished.[1]

The various means by which a document can be freed from all charges brought against it have been enumerated by the authorities. We quote below the principal texts on the subject :

सन्दिग्धलेख्यशुद्धिः स्यात् स्वहस्तलिखितादिभिः ।
युक्तिप्राप्तिक्रियाचिह्नसम्बन्धागमहेतुभिः ॥[2]
यत्र स्यात् संशयो लेख्ये भूताभूतकृते क्वचित् ।
तत् स्वहस्तक्रियाचिह्नयुक्तिप्राप्तिभिरुद्धरेत् ॥[3]
वर्णैश्च तत्कृतैश्चिह्नैः पत्रैरेव च युक्तिभिः ।
सन्दिग्धं साधयेल्लेख्यं तद्युक्तिप्रतिरूपितैः ॥[4]

The substance of these verses is that when the authenticity of a document is called in question it should be established by means of *svahastalikhita*, *yuktiprāpti*, *kriyā*, *cihna*, *sambandha* and *āgama*. The most important of all these means is *svahastalikhita* (the handwriting of the writer himself). What is meant is that a judgment as to the genuineness of a document may be formed by the resemblance of its writing to the handwriting of the person mentioned as its writer. According to the Mitākṣarā this mode of proof should be given in the first instance.[5] There is no doubt that the institution of comparison between the handwriting in the document in dispute and the handwriting of the obligor becomes most essential in the case of the genuineness of a *svahasta* document (a document wholly in the handwriting of the obligor) being called in question,

[1] Sc., p. 143.
[2] Nār. IV. 143.
[3] Yāj. II. 92.
[4] Viṣ. VII. 12.
[5] यदा तु लेख्यसन्देहे निर्णयो न जायते तदा साक्षिभिर्निर्णयः ।—Mit. on Yāj. II. 92.

especially when such a document is unattested. For the purpose of comparison a general standard of the handwriting of the obligor must be obtained and it is clear that such a standard may best be supplied by papers and documents formerly written by him. Thus the Mitākṣarā says that in establishing the genuineness of a document by *svahastalikhita*, the bonds and documents known to be in the handwriting of the supposed writer must be allowed in evidence.[1] It may, however, be noted here that this view of the Mitākṣarā is based on a text of Hārīta which declares that when doubt arises regarding the handwriting of the obligor, whether he is living or dead, it should be proved by means of other documents known to be written by his own hand.[2] The real point here should not be missed. The rule propounded by Hārīta signifies that the supposed writer will not be allowed to write while the trial is going on with a view to supply a specimen of his handwriting for the obvious reason that he may then write not in a natural but in a feigned hand.

The Mitākṣarā further contends that the expression *ādi* in Yājñavalkya's text implies that the writing of a document and its signatures may be compared with the specimens of the handwriting of the scribe and the witnesses for the purpose of ascertaining whether the document has been actually written by the scribe and attested by the witnesses mentioned in the document.[3] This commentary obviously extends the principle of comparison to other documents, *i.e.*, documents other than the unattested *svahastas*, and in doing so is supported by a text of Nārada which enjoins that all doubts regarding the authenticity of the three kinds of documents (*svahasta* without witnesses,

[1] स्वहस्तेन लिखितं यत् लेख्यान्तरं तेन यद्विः—Mit. on Yāj. II. 92.

[2] यस्मिन्स्वहस्तसन्देहे जीवतो वा मृतस्य वा।
तत्स्वहस्तैः कृतैरन्यैः पत्रैस्तद्वै ख्यनिर्णयः॥—Aparārka, p. 69. Sc., p. 144.

[3] आदिशब्दात् साक्षिलेखकस्वहस्तलिखितान्तरसंवादात् यद्विरिति।—Mit. on Yāj. II. 92.

svahasta with witnesses and *anyakṛta*) should be removed by a comparison of the handwriting of the obligor, witnesses or the scribe found elsewhere with that contained in the disputed document.[1]

Vijñāneśvara who evidently attaches a greater weight to similitude of handwriting in the matter of establishing the genuineness of a document than to witnesses and other kinds of proof, finds himself contradicted by two *smṛti* texts, one of Kātyāyana and another of Hārīta. The text of Kātyāyana declares that in the case of a document being impugned, its genuineness is to be proved by witnesses and other persons named in the bond.[2] Hārīta's text is to the effect that ordeal is to be resorted to in order that the genuineness of a document may be ascertained when it is impeached by the obligor saying 'this document was not executed by me but has been fabricated by the plaintiff.'[3] Vijñāneśvara reconciles these texts. According to him the former text refers to a case where judgment cannot be based on the comparison of handwriting on account of no specimen of the handwriting of the supposed writer being at hand and the latter text to a case where witnesses are also not forthcoming.[4]

What the Mitākṣarā says may thus be briefly summarised :— when a document is produced by the creditor and impugned by the debtor it becomes necessary in the first instance to show that it was written by the person who is named as scribe or the debtor himself. Now it may be done in two ways. First by calling in the person who is supposed to have written the

[1] Vm., p. 339.

[2] दूषिते पत्रके वादी तदाप्तांस्तु निर्दिशेत्—Mit. on Yāj. II. 92.

[3] न मयैतत् कृतं पत्रं कूटमेतेन कारितम्।
अधरीकृत्य तत् पत्रमथो दिव्येन निर्णयः।—Mit. on Yāj. II. 92.

[4] यदा तु लेख्यसन्देहे निर्णयो न जायते तदा साक्षिभिर्निर्णयः कार्यः। साक्षिसम्भवविषयमिदं (कात्यायन)वचनम्। साक्ष्यसम्भवे तु हारीतवचनम्—Mit. on Yāj. II. 92.

document and those who are mentioned therein as witnesses or by having recourse to a comparison of the document in dispute with any writing of the supposed writer known to be genuine. Preference should be given to this latter method and for the purpose of comparison other documents and papers written by the supposed writer should be allowed in evidence. When, however, for some reason or other such a comparison becomes impossible, then and then only witnesses or the scribe should be called in to give evidence as to the genuineness of the document. When witnesses are also not available recourse should be had to ordeal.

Aparārka dissents from the view of the Mitākṣarā regarding the relative importance of witnesses and *svahastalikhita* in the matter of proving the genuineness of a disputed document. He holds that the text of Yājñavalkya primarily refers to those documents which have not been attested and thus by their very nature do not admit of ocular proof.[1] He is followed by Devaṇabhaṭṭa who elaborates the point thus: when there are witnesses reliance should not be put on the similitude in writing; when, however, witnesses cannot be had a comparison between the handwriting of the writer with that in the bond may be had recourse to.[2] Devaṇabhaṭṭa characterises witnesses as **स्पष्टनिर्णायक** (having the capacity of directly settling a dispute) and the proof of the similitude of handwriting as its reverse. He quotes the authority of Kātyāyana in support of the greater efficacy of ocular proof. Kātyāyana's verse runs thus: 'pratyakṣa' (direct or ocular evidence) is never superseded by *anumāna* (inference); obligors impugn documents with a view to personal gain; the genuineness of such impugned documents should be established by means of the evidence of

[1] एतच्चाधमर्णेन साक्षिरहितं स्वहस्तेन कृतं यल्लेखं तद्विषयवचनम् ।—
Aparārka on Yāj. II. 92.

[2] Sc., p. 144.

witnesses.'[1] There are two other texts, one by Kātyāyana and the other by Nārada, which also are in favour of the view held by Devaṇabhaṭṭa. The former declares that in disputes in which one party says that the document produced was properly executed and the other party denies it, its genuineness or otherwise is to be determined from the evidence of witnesses ;[2] and the latter that the genuineness of a writing (*likhita*, *i.e.*, a document) should be proved by writing (handwriting), but when there are witnesses they will prove it.[3] Nārada has laid down, as has already been noted, that *likhita* (a writing) is always superior to *sākṣī* (witnesses) as a means of proof. Now *likhita* means not only a document but handwriting as well. Thus the rule of Nārada may be taken to suggest the advisability of resorting to comparison of handwriting as a means of clearing up doubts from a document in preference to witnesses (*sākṣī*). Devaṇabhaṭṭa seems not to disfavour such an interpretation but says that the word *sākṣī* must then be taken to refer to persons who have merely witnessed the execution of the bond but are not attesting witnesses.[4]

What Devaṇabhaṭṭa wants to drive at is that witnesses should be examined if they can be had and in their absence only proof of handwriting may be resorted to. Thus where Vijñāneśvara gives greater importance to handwriting Devaṇabhaṭṭa does it to ocular proof. The question as to the relative importance of ocular proof and the proof of handwriting in establishing the authenticity of a document cannot arise, it is evident, when all persons connected with its execution are

[1] Sc., p. 145.

[2] कृताकृतविवादेषु साक्षिभिः पक्षनिर्णयः ।—Kāt. (Sc., p. 144). Aparārka, p. 69. Aparārka reads विचारेषु for विवादेषु.

[3] Nār. IV. 145.

[4] यत् पुनर्मेधातिथिः—साक्षिभ्यां लिखितं श्रेयं लिखितान्नतु साक्षिण इति तत्रैवं व्याख्यानाद्दृष्टसाक्षिविषयम् । —Sc., p. 145.

dead. In that circumstance the necessity for having recourse to the test of comparison will naturally arise. Thus we see the rule of Kātyāyana to the effect 'if the scribe and all the witnesses are dead, the authenticity of a document is to be ascertained by their handwriting and other means.'[1] Viṣṇu also says, 'should the debtor or creditor or witnesses or scribe be dead, then the genuineness of a document has to be proved by instituting a comparison between it and other specimens of their handwriting.'[2] The mention of creditor (*dhanika*) in Viṣṇu's text shows, the Vyavahāramātṛkā comments, that such a comparison is also permissible to test the genuineness of receipts or letters of acquittance (*śuddhipatra*).[3]

Whatever may be the importance of the proof of *svahasta-likhita* (one's own handwriting) in comparison with ocular proof in establishing the authenticity of a document, it cannot be denied that even in its best form it is often precarious and sometimes extremely dangerous. Our lawgivers seem to have fully realised it and the deceptive nature of this kind of proof is exposed by them in the following observations: "Clever forgers knowing the proper place and time make writings similar to the original one," "clever forgers will easily make an image (*bimba*), *i.e.*, perfect imitation of a writing and thus it may just be likened to the reflection in a mirror which though unreal seems to be real";[4] "forgers may produce a writing which is just the picture, *i.e.*, an exact representation of another writing, and therefore it should not be made the sole basis of decision."[5] What the lawgivers intend to say is that

[1] Aparārka, p. 689, Vm., p. 339.

[2] Viṣ., VII. 13.

[3] धनिको वापीति शुद्धपत्रिकाविषयम्।—Vm., p. 339.

[4] Kāt., in Vīram., p. 197.

[5] लेख्यमालेख्यवत् केचित् कुर्वन्ति कुशला नराः।
तस्मात्र लेख्यसामर्थ्यात् सिद्धिरैकान्तिकी मता॥—Vyāsa in Vīram., p. 197.

it being possible for many persons to write alike on different occasions and also to imitate the handwriting of others it often becomes difficult to distinguish between the handwriting of a forged document produced as genuine and the specimens of the handwriting of its supposed writer, and thus injustice is sure to follow if absolute reliance is placed on the mode of proof by resemblance. Taking this into account Aparārka expresses the opinion that the mode of authentication by *svahastalikhita* should not be allowed to operate independently of the other modes advocated by Yājñavalkya and Nārada along with it, *viz.*, *yukti*, *prāpti*, *kriyā*, *cihna*, etc.[1] He means to say that in forming judgment about the genuineness or otherwise of a document from a comparison of handwriting, other recognised modes should not be altogether left out of consideration. So far as these modes are concerned, they may prove the genuineness of a document either independently or as adjutants to other modes of proof.[2] *Prāpti*, however, cannot be an independent proof but is only to assist other modes.[3]

We shall now see how the terms *yukti*, *prāpti*, etc., have been explained. According to Asahāya *yukti* means circumstantial evidence or a consideration whether certain facts can go together or not. Thus a document recording a debt of one lac of *drammas* (drachmas) from a poor man may be safely regarded as false.[4] Viśvarūpa thinks that such circumstances as the defendant's need of money at the time when the document is alleged to have been written and any investment

[1] Aparārka, p. 688.

[2] युक्त्यादीनामपि तत्रैव पत्रके स्वयं प्रमाणतया प्रमाणान्तरानुयाहकतया निर्णायकत्वम्।
—Aparārka, p. 688.

[3] एतच्च प्रमाणान्तरानुयाहकतया युक्तिरितुर्न स्वातन्त्र्येण।—Aparārka, p. 688.

[4] युक्त्या चानया युज्यमानतार्थता। पुरुषस्य दारिद्र्ये द्रम्मलक्षधनिकत्वात्।—
—Asahāya on Nār. IV. 143.

of money by the plaintiff at that time should also be taken into consideration.[1] Aparārka takes the term to mean *arthāpatti*, *i.e.*, deduction of a matter from what could not else be.[2] *Prāpti* means, according to Asahāya, a consideration as to how the obligee has come by the document or a consideration of his demeanour at the time of his examination, that is to say, whether he is nervous or whether his manner of speaking is composed and unruffled.[3] Viśvarūpa and Aparārka take the expression in the sense of a consideration whether the obligor and the obligee were both residing in the same place at the time when the document is said to have been written.[4] Jīmūtavāhana takes *yuktiprāpti* as a single expression and thinks that the above sense is conveyed by the whole compound.[5] The Mitākṣarā takes the whole expression *yuktiprāpti* as an instrumental compound (*tṛtīyātatpuruṣa*) and breaks it as *yuktyā prāptiḥ*. *Yukti* is explained by this commentary to mean 'reconcilement of the relation between the property and the time, place and persons' and the whole compound 'a consideration whether at such a time and in such a place such a person is likely to have possessed so much property.'[6] The Vīramitrodaya accepts this interpretation of the Mitākṣarā.[7]

[1] तस्मिन् काले देवदत्तस्य द्रव्यप्रयोजनमासीत्। यज्ञदत्तस्य तदा स्वधनं प्रयुक्तवान्। इत्यादिका युक्तिः।—Bālakrīḍā on Yāj. II. 92.

[2] युक्तिरर्थापत्तिः—Aparārka on Yāj. II. 92.

[3] प्राप्तिर्द्विधा एका कथमनेन पत्रमिदं प्राप्तम्। द्वितीया जल्पतः साध्वौध्यसाध्वौध्यं वा—
Asahāya on Nār. IV. 143.

[4] समानदेशस्थौ तदीभावव्यभूताम्—Bālakrīḍā on Yāj. II. 92.
प्राप्तिरेकत्र देशे काले च वादिप्रतिवादिनोः स्थितिः।—Aparārka on Yāj. II. 92.

[5] युक्तिप्राप्तिः पत्रलिखितदेशकाले तयोः सद्भावस्थानम्—Vm., p. 339.

[6] युक्त्या प्राप्तिः युक्तिप्राप्तिः। देशकालपुरुषार्थानां द्रव्येण सम्बन्धः प्राप्तिः। अस्मिन् देशे अस्मिन् काले ऽस्य पुरुषस्येदं द्रव्यं घटत इति युक्तिप्राप्तिः।—Mit. on Yāj. II. 92.

[7] Vīram., p. 198.

Whatever may be the various explanations proposed for these two expressions it is clear that they do not mean anything very different from a reasonable inference that can be drawn from various circumstances.

Kriyā means investigation as to the character of the scribe according to Viśvarūpa. Thus if it be known that the scribe of a particular document is not a cheat, then that document may be presumed to be genuine. The Mitākṣarā following Asahāya takes the expression in the sense of attesting witnesses. Aparārka gives the more rational meaning of **संव्यवहार** (mutual transaction) to it and explains that if it comes to light that there cannot be any transaction between the plaintiff and the defendant just as between an Aryan and a Dravidian then the document relied on by the plaintiff will lose all its force as proof.[1]

Cihna is explained by Asahāya as peculiar marks in a document such as flourishes in the handwriting of the scribe.[2] It is evident that such marks are to be taken into consideration in comparing the original document with any specimen of handwriting (*svahastalikhita*) of the supposed writer. So this meaning is hardly applicable to *cihna* which is mentioned separately from *svahastalikhita*. Viśvarūpa and Aparārka explain it by 'seal.'[3] It may mean according to the Mitākṣarā some distinguishing mark such as the word *śrī* used in the document.[4]

Sambandha means connection and it may be founded on descent, caste, marriage, friendship and social intercourse.[5]

[1] यथो: खलु नाय्यार्यद्रविडयोरिव संव्यवहारस्तथ लेख्यं प्रति प्रामाण्यसम्भवनिरस्तम् ।—
Aparārka on Yāj. II. 92.

[2] लेखकलिपिचिह्ननिरूपणेन चिह्नेन—Asahāya on Nār. IV. 143.

[3] चिह्नं मुद्राचिह्नं मुद्रालिपिविशेषादिकम्—
Aparārka and Viśvarūpa on Yāj. II. 92.

[4] चिह्नमसाधारणं श्रीकारादि—Mit. on Yāj. II. 92.

[5] Asahāya on Nār. IV. 144.

Viśvarūpa explains it to mean the absence of any indication of force or fraud.[1] It may signify, the Mitākṣarā says, the former relation of money transactions between the parties from mutual confidence.[2]

Āgama means title and indicates that a consideration is to be made whether it has been possible for the creditor to come by so much property by any of the legitimate means of acquiring ownership such as inheritance, purchase, mortgaging, seizure, friendship and finding.[3] Viśvarūpa takes the expression in a different sense. According to him it consists in seeing if the document has all the characteristics that it should have.[4]

According to the Mitākṣarā *hetu* occurring in Yājñavalkya's text is used not to designate any mode of proof like *yukti*, *prapti*, etc., but in its general sense of 'means.' What this commentary wants to say is that *yukti*, *prāpti*, *kriyā*, etc., do constitute the *hetus* or means of proof.[5] Nārada's text does not however support this explanation. The plural number in **सम्बन्धागमहेतुभिः**,[6] indicates that *hetu* is to be regarded as a separate means of proof. As a matter of fact Kalyāṇabhaṭṭa, Viśvarūpa and Aparārka have all taken it in this light, though they do not quite agree with each other as regards the meaning of the term. Kalyāṇabhaṭṭa suggests two meanings

[1] बलोपध्यादभावः—Viśvarūpa on Yāj. II. 92.

[2] सम्बन्धोऽर्थिप्रत्यर्थिनोः पूर्वमपि परस्परविश्वासेन दानग्रहणादिसम्बन्धः।—
Mit. on Yāj. II. 92.

[3] Asahāya on Nār. IV. 144.
आगमोऽस्यैतावतोऽर्थस्य सम्भावितः प्राप्त्युपायः—Mit. on Yāj. II. 92.
आगमो विवादास्पदीभूतस्यार्थस्य स्वस्वामिसम्बन्धोपायः क्रयादिः।—
Aparārka on Yāj. II. 92.

[4] आगमो लेख्यलक्षणयोगः—Bālakrīḍā on Yāj. II. 92.

[5] एते एव हेतवः एभिर्हेतुभिः—Mit. on Yāj. II. 92.

[6] Nār. IV. 144.

for it, *vitarka* (reasoning) and *nimitta* (reason or motive).[1] Aparārka gives it the meaning of *anumāna* (inference).[2] We think, however, that the meanings of *vitarka* and *anumāna* are covered by the expression *yukti* and hence *nimitta* is the meaning which should be assigned to *hetu*. It may thus be said that when a document is impeached its genuineness may be proved by enquiring into the reasons which led the defendant to contract the debt recorded therein. Viśvarūpa's explanation is that *hetu* implies a consideration as to the non-existence of such blemishes as attestation by false witnesses and the like.[3]

These interpretations as well as the original texts quoted above make it evident that the genuineness of a document in earlier days could be established not only by means which may be characterised as internal but by means extraneous to it as well. Each of the modes *yukti*, *prāpti*, *kriyā*, *cihna*, etc., is after all a species of circumstantial evidence and hence another point of law, namely, that circumstantial evidence was admitted to prove the validity and authenticity of a document and further that such circumstantial evidence was in most cases not secondary to the direct is fully illustrated.

It deserves to be noted in this connection that evidence, circumstantial or oral, was allowed not to prove the contents of a document but merely its genuineness. The contents were generally proved by the instrument itself. This conclusion is drawn from the rule that a document remains evidence, though under certain conditions, even after the death of the obligor, the scribe and the witnesses. What this rule intends to say is that 'the writing preserves unchangeably what is entrusted to it and expresses the intention of the parties by its own testimony.' We have already noticed the exceptional

[1] वितर्के च निमित्ते च हेतुशब्दः प्रयुज्यते—Asahāya on Nār. IV. 144.

[2] हेतुरनुमानम्—Aparārka on Yāj. II. 92.

[3] कूटसाक्षितात्यसम्भवी हेतुः—Bālakrīḍā on Yāj. II. 92.

circumstances which could make the secondary evidence of the contents of a document in the shape of oral testimony of witnesses receivable.

We find mention of a number of *doṣas* which from their very nature seem to be the *prakaṭadoṣas*, *i.e.*, blemishes which vitiate a document on the face of it and which are not to be pointed out by the opposite party but to be taken notice of by the tribunal. Disrespect of local usage and violation of the prescribed order in which the contents of the document are to be put, the defects which we have already referred to, are mentioned among these *doṣas*.[1] These *doṣas* are further discernible in a document : [2]

1. When its letters are displaced.
2. When its letters are not in their proper lines.
3. When its letters are illegible.
4. When its letters are not in their natural forms.
5. When its letters are heaped upon one another.
6. When it appears to be written by the party producing it.
7. When the thing to be established cannot be made out.
8. When it is full of *kākapadas*, *i.e.*, the sign ∧ denoting that something has been left out.
9. When the *mātrās* and *bindus* are wanting.
10. When it appears to have its several parts joined together.
11. When it is found to be injured.
12. When though very old, it looks like a fresh one, or, when though recently executed it looks like an old one.
13. When it is full of letters broken or obliterated.

The question of proper custody of a document did not escape the notice of our lawgivers. It is laid down by Vyāsa that

[1] Sc., p. 141.
[2] *Ibid*, p. 141.

when a document of one is produced from the possession of another, it can be admitted in evidence only after proper explanation has been given as to why it passed into the hands of the stranger.[1] Nārada's text on this point is a little ambiguous. It is clear, however, that it recommends an investigation by circumstantial evidence, in case a document is produced from the custody of a person with whom it cannot be expected to lie. The text is as follows :

लेख्यं यच्चान्यनामाङ्कं हेत्वन्तरकृतं भवेत् ।
विप्रत्यये परीक्ष्यं तत् सम्बन्धागमहेतुभिः ॥[2]

Asahāya explains the text thus : a document is originally written in the name of one to whom the money belongs. It may pass by purchase or acceptance from its original owner into the possession of a stranger. The stranger then claims the loan recorded in it from the debtor. Doubt may easily arise as to its genuineness on account of its being produced from a keeping in which it cannot be reasonably expected. When this is the case the document should be examined by an enquiry into *sambandha* (the relation previously existing between the parties), *āgama* (probability of title) and *hetu* (reason for contracting the debt).[3] Devaṇabhaṭṭa's interpretation is quite different. According to him the rule of Nārada refers to what may be called in modern phraseology *benāmī* transactions. He says that in order to cheat his relative or kinsman the creditor may get a document executed in the name of a third person. When subsequently the loan is claimed by him on the strength of that document, it is for the tribunal to examine it minutely by resorting to *sambandha*, *āgama* and

[1] यच्चान्यस्य कृतं लेख्यमन्यद्दत्ते प्रदृश्यते ।
यवश्यं तेन वक्तव्यं पत्रस्यागमनं ततः ॥—Aparārka, p. 690.

[2] Nār. IV. 144.

[3] Asahāya on Nār. IV. 144.

hetu on account of its coming from the custody of one who appears to be a different person from him named as creditor in the bond.[1]

Another rule in connection with a document is that its discharge is to be by its destruction by the creditor on getting back his loan or by another document. It is laid down by Yājñavalkya that when the debtor has executed a document on taking a certain loan, all part payments of the same should be recorded in his handwriting on the back of the document or acknowledged by the creditor by receipts written by him.[2] But when the debt has been paid in full, the original document should be destroyed.[3] When, however, it is in an inaccessible place and is not forthcoming then a receipt in case of part payment and a letter of release in case of full satisfaction should be obtained from the creditor.[4] It is further laid down that the discharge of a debt recorded in an attested document should be attested preferably by those who were witnesses to the original transaction.[5]

It will be interesting to note that some of the principles noted above are similar to those recognised in the modern system of jurisprudence as well. The modern law holds in the first place that the secondary evidence of an ancient document, *i.e.*, of a document thirty years old, is admissible without proof of execution of the original when the document is shown to have been lost. Secondly it attaches hardly any weight to documents which though ancient are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof. Thirdly it insists that documents must be

[1] इत्यन्तरकृतं दायादिर्धनार्थम् कृतम्। विप्रत्ययो विप्रतिपत्तिः—Sc., p. 148.

[2] Yāj. II. 93. [3] Yāj. II. 94.

[4] यदा तु दुर्गदेशावस्थितं लेख्यं नष्टं वा तदा ग्रहीता अधमर्णेनिऋण्यर्थमन्यल्लेख्यं कारयेत् उत्तमर्णेनाधमर्णः।
—Mit. on Yāj. II. 94.

[5] Yāj. II. 92.

produced from proper custody, *i.e.*, from the place in which, and from the person with whom they would naturally be, and fourthly, it lays down that 'in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.'

Public Documents.

According to Kauṭilya public documents have several varieties.[1] The Dharmaśāstras mention only five of them and they are :[2]

1. *Śāsana.*
2. *Jayapatra.*
3. *Ājñāpatra.*—A writ of command to feudatory princes, government servants and governors of provinces.
4. *Prajñāpanapatra.*—A writ of information to the priests who officiate at sacrifices, family priests and preceptors.
5. *Prasādalekhita.*—A writ of royal favour shown to persons for rendering faithful services or for their valour and other laudable qualities.

Śāsana and *Jayapatra* are the most important of these kinds. We shall give some account of them in the following few pages.

Śāsana.

Śāsana in the law books means a donative grant. Yājñavalkya says : 'when a king makes any grant of land, village or gardens or makes a *nibandha*, *i.e.*, creates a charge in favour of any one, he should leave the terms committed to writing for

[1] Kau. II. 10. [2] Viram., p. 195 ; Sc., pp. 125-132.

the information of future *kings*.' [1] The term *nibandha* has been explained in different ways by different commentators. Viśvarūpācārya takes it to mean permanent endowment.[2] Devaṇabhaṭṭa and Aparārka take it in the sense of an arrangement made through the intervention of the king for money to be given annually or monthly to a Brāhmaṇa or a deity by traders or other wealthy persons.[3] Devaṇabhaṭṭa further observes that the merit arising out of the gift accrues to the king inasmuch as he induces the actual donors to make it.[4] Vijñāneśvara takes the words *pratigraha* and *nibandha* as synonymous.[5] *Pratigraha* means a donation generally. Another explanation offered by him of the term seems to indicate that a document was needed when a piece of land was leased out for rent which was to be given either in cash or in kind. The lessee was to pay, for instance, a certain sum for a certain amount of produce in the land taken on lease or a share in the produce itself.[6] Caṇḍeśvara explains the term *nibandha* as assignment of what is settled with certainty such as a fixed gain from a mine or the like.[7] We think, however, that *bhūmiṁ dattva* and *nibandhaṁ kṛtvā* refer to two distinct things, the former to secular donations, *i.e.*, grants to private individuals not in any way connected with religion and the latter to religious endowments, *i.e.*, donations and endowments made to Brāhmaṇas, gods and religious institutions.

Both these kinds of grants are to be registered in inscriptions termed *śāsana*. The materials on which these inscriptions

[1] Yāj. I. 318.

[2] निबन्धोऽक्षयनिधिः ।

[3] Aparārka on Yāj. I. 318 ; Sc., p. 125.

[4] अत्र यद्यपि धनदातृत्वं वाणिज्यादिकर्तुरेव पुण्यं तदुद्देशेनैवेतरस्य प्रवृत्तेः ।
—Sc., p. 125.

[5] प्रतिगृह्यते इति प्रतिग्रहो निबन्धः—Mit. on Yāj. I. 320.

[6] Mit. on Yāj. II. 121.

[7] निबन्ध आकरादौ नियतं लभ्यम्—Vivādaratnākara, Ch. II.

are to be recorded are mainly two, namely copper-plates and pieces of cloth according to Yājñavalkya, Bṛhaspati and Vyāsa.[1] Viśvarupācārya comments that *bhūrjapatra* (*i.e.*, bark of the birch tree) are never to be used for this purpose,[2] evidently owing to its perishableness. As a matter of fact the ancient inscriptions that have come down to us recording grants and endowments are mostly written on copper-plates and many of them style themselves on this account *tāmraśāsana* or copper-plate grants. We have come across no inscription written on a piece of cloth.

The most important thing in connection with royal charters is that they should be precisely dated. A precise statement of the year, the month, the fortnight and the day on which a grant is made should be recorded in the plate.[3] We know from many inscriptions that dates could be given in words as well as in numerals. The specification of the details of the donor and the donee and of the donation forms also a very important factor in all records relating to grants. The precepts of the legal treatises are that the king should state the names of himself and his three immediate male ancestors.[4] Viśvarūpācārya thinks that the names of the female ancestors should also be stated.[5] The name of the grantee, his father's name, his family and caste and the name of the Vedic school to which he belongs should also be mentioned in the record.[6] It should also contain such particulars as the value of the donation or, in the case of bequest of land, the statement of

[1] Yāj. I. 319; दत्त्वा भूम्यादिकं राजा ताम्रपट्टे तथा पटे। शासनं कारयेत्—Bṛhaspati. राज्ञा तु स्वयमादिष्टः सन्धिविग्रहलेखकः। ताम्रपट्टे पटे वापि (Vyāsa).

[2] पटवचनं भूर्जनिवृत्त्यर्थम्—Bālakrīḍā on Yāj. I. 319.

[3] Viram., p. 192 ; Sc., pp. 126-129.

[4] Yāj. I. 319 ; आदावेवाभिलेखनीयाः पूर्वपुरुषास्त्रयः (Viśvarūpa). वंश्यान् प्रपितामहपितामहपित्राख्यान्—Sc., p. 126.

[5] वंश्यत्ववचनात् स्त्रियोऽपि—Bālakrīḍā on Yāj. I, 319.

[6] Pds., p. 123 ; Sc., p. 127.

the area and its description by boundaries.[1] The document according to the legal treatises, is to be composed by the *Sandhivigrahakārī* (an officer for peace and war).[2] *Sandhivigrahakārī* is an official or military title and its synonymous title is *Sandhivigrahalekhaka*. This title is signified by *Sandhivigrahika* in the Nītivākyāmṛta and in the inscriptions.[3] It will be interesting to note in this connection that it is distinctly mentioned in many copper-charters that they were written (*likhita*) by the *Sāndhivigrahika*. The *Sāndhivigrahika*, according to the Nītivākyāmṛta, is to be well versed in all languages, acquainted with the rules of the different *āśramas* and castes and is to know all kinds of scripts. He should also be able to write well and read quickly. The words *vilikhet* in the injunction of Vyāsa and *likhitam* in the inscriptions used in respect of the *Sāndhivigrahika* in all probability refer to the composition or drawing up of the record and not to actual writing. This conclusion seems irresistible from the high position that the *Sāndhivigrahika* or *Mahāsāndhivigrahika* held in the administration as well as from the nature of the qualifications which he is said to have possessed. His duty was only to compose and draft the record. The writing of it on the plate was left to the *lekhaka* or the professional scribe. A *lekhaka* is mentioned in the *arthaśāstra* as a person possessed of ministerial qualifications, acquainted with all sorts of customs, skilled in composition, a good and legible hand and an expert in reading.[4] References to *lekhaka* are also found in the injunctions attributed to Vyāsa and Prajāpati.[5] A

[1] प्रतिग्रहपरीमाणम्—Yāj. I. 320.

[2] राज्ञा तु स्वयमादिष्टः सन्धिविग्रहलेखकः—Pds., p. 122.

[3] Prakīrṇaka Samuddeśa, 2 (Nītivākyāmṛta).

[4] Kau. II. 10.

[5] सन्धिविग्रहकारो च भवेद् यद्यपि लेखकः ।—Sc., p. 146.
कार्यो यत्नेन महता निर्णयो राजशासने ।
राज्ञा स्वहस्ततन्मुद्रालेखकाक्षरदर्शनात् ॥—Sc., p. 146.

distinct mention of *śāsana-lekhaka* is found in a verse occurring in the Rājanītiratnākara. It is said here that he should be intelligent enough to understand a thing though it is said only once, smart in writing, sharp in reading and versed in all the *śāstras*.[1] The evidence of inscriptions also corroborates the view that the composer and the writer were generally two different persons. They are separately mentioned in the Mandasore Stone Inscriptions of Kumāragupta and Bandhuvarman as *kartṛ* and *lekhaka*. The *lekhaka* is termed *kāyastha* in the Kapalesvar grant of Mahābhava Gupta. This is strictly in accordance with an injunction of Viṣṇu.[2] It is also evident from this inscription that the *lekhaka* belonged to the office of the *Sāndhivigrahika*. From the double expression *racayāñcakāra* and *lilikhe* used in reference to one and the same person, it is only reasonable to suppose that when the *lekhaka* happened to be an exceptionally brilliant man, the task of composition also was left to him. The text of Vyāsa which says that the *Sandhivigrahakārī* or the *lekhaka* should compose the royal grant[3] under orders of the king should be understood in this sense.

The process of engraving comes next. It is denoted in the inscriptions by the term *utkīrṇa*. The engraver had, under the guidance of the *Sāndhivigrahika*, to follow the writing on the plate and impress it with his tools. In the Kapalesvar grant of Mahābhava Gupta referred to above the engraver and the writer are mentioned as two different persons.

Another important thing in connection with a royal charter is that it should be authenticated. The methods of giving authentication are mainly two. First it should be sealed with

[1] सकृदुक्तं गृहीतार्थो लघुहस्तो जिताक्षरः।
सर्वशास्त्रसमालोची एव शासनलेखकः॥—p. 21.

[2] Viṣ. VII. 2.

[3] सन्धिविग्रहकारी च भवेद् यद्यपि लेखकः—Sc., p. 146.

the royal seal[1] and secondly it should be given the *svahasta* or the king's own hand,[2] *i.e.*, an autograph signature of the king from whom the charter emanates. From many inscriptions we know that sometimes an actual representation of a sign-manual was given and that it was occasionally represented by some marks. In plate 39 (Corpus Inscriptionum Indicarum, Vol. III) there are some wavy lines under the words *svahasta* and these are evidently intended to represent some kind of sign-manual. "The custom of attaching royal authentication to charters has given us a large and highly interesting series of ancient Indian seals, some of them presenting devices only, others only legends, and others both legends and devices and some of them being of an extremely elaborate kind."

Another essential thing in connection with a royal charter is that it should be provided with the expression *rājādeśena* meaning 'by order of the king himself.'[3] This expression shows that the official in charge of the drawing up of the charter could not do it without an express order from the king.[4] This order was either given directly or communicated through an officer. When it was directly given the custom required that the fact should be recorded as such in the charter itself. As a consequence we find such expressions as '*ājñāsvayam*' (the order is that of the grantor's own mouth), '*svamukhājñā*,' '*ājñaptiḥ svamukham*' (the order is that of the grantor's own mouth), '*svamukhājñayā utkīrṇam*' (engraved at

[1] मुद्रितं राजमुद्रया (Vyāsa)—Sc., p. 128 ; राजमुद्राङ्कितं तथा (Vyāsa)—Sc., p. 129 ; समुद्राङ्कम् (Viṣ.)—Vīram., p. 194 ; मुद्रितं राजमुद्रया—Vīram., p. 193 ; समुद्रोपरिचिह्नितम्—Yāj. I. 319.

[2] स्वहस्तकालसम्पन्नम्—Yāj. I. 320 ; स्वहस्तं च लिखेत् स्वयम्—Pds., p. 123 ; राजस्वहस्तचिह्नेन—Sc., p. 128.

[3] राजादेशेन संयुतम्—Sc., p. 128.

[4] Vyāsa's injunction राज्ञा स्वयं समादिष्टः, etc. (Sc., p. 128) points to the same conclusion.

the order of the grantor's own mouth), etc., mentioned in many royal grants. When the sanction to draw up the charter was not directly given, it was communicated to the office of the *Sāndhivigrahika* through an officer ordinarily styled *dūtaka* in the inscriptions. Another regular title of the officer who carried the king's sanction and order to the officer concerned was *ājñādāpaka* (conveyor of orders) as is evident from the Ujjain grant of Vākpatirāja of Dhāra. The same office is referred to in such expressions also as '*ājñāmahāmahattara*' *Gaurīśarmā* (the order is conveyed by the Mahamahattara Gaurīśarmā), '*ajñaptiḥ Siyaśarmā*' and '*ājñaptiḥ Dāma Kīrttibhojakaḥ.*' Hindu law texts do not mention any such office as that of the *dūtaka* but we find in a text attributed to Vyāsa the mention of *dūtas* and *mahattaras* as persons among others to be addressed by the king in connection with formal grants with a view to give them publicity.[1]

It is also enjoined in a text of Vyāsa that the king should put the *pramāṇa* and *sanniveśa* with his own hand just like the *svahasta.*[2] These two terms have been explained by the Mitākṣarā. *Pramāṇa* means dimension which is to be specified in *bighās* or other land-measures, and *sanniveśa* should be taken in the sense of site, *i.e.*, the houses or lands by which the property is bounded on all sides.[3] Mitramiśra sees no utility in observing this rule, *viz.*, that the king should put *pramāṇa* and *sanniveśa* with his own hand strictly.[4] According to him the specification of *pramāṇa* and *sanniveśa* may be done by others as well for the king.

Another legal precept in connection with a royal grant is that it should bear the words 'this is known by me' from the donor and that it should bear the signature of the head of the

[1] Sc., p. 127.

[2] सन्निवेशं प्रमाणञ्च स्वहस्तं च लिखेत् स्वयम्—Viram., p. 193.

[3] Mit. on Yāj. II. 6.

[4] तयोः राज्ञस्वहस्तलिखनानियमात्—Viram., p. 194.

department concerned with its drafting and delivery as well as of the writer (*lekhaka*).[1]

We have seen above that a royal grant should be sealed in order to make it authentic beyond all manner of doubt. Mitramiśra and Devaṇabhaṭṭa hold on the strength of the words *dadyāt* and *dattam* used in the injunctions of Viṣṇu and other authorities relating to royal grants, that such grants should also be delivered.[2] The actual delivery into the hands of the grantees was done perhaps not by the king himself but by the local officials who drew up and prepared the charters. We know from the Śukranīti that these officials had to keep copies of all documents bearing the king's seal such as grants, etc. It is said there, 'after the lapse of time kings may entirely forget or may have a mistaken impression of what they did; so officers should keep copies of the royal writs to serve as reminders in case of doubt or forgetfulness.'[3] These copies served also another purpose. We know from Manu that even royal grants were sometimes forged inspite of all precautions.[4] The Madhuvana record of A. D. 630 of Harṣavardhana of Thaneswar and Kanauj bears evidence to the forgery of royal grants. A reference to forged copper-plates may also be found in another inscription recorded in the Indian Antiquary, Vol. XXX, pp. 201 ff. So it is just possible that whenever any doubt arose as to the genuineness of a royal grant the office copy was looked upon as the best means of verification. A text of Kātyāyana seems to imply, however, that ordinarily the authenticity of a royal charter was not to be confirmed by the usual and ordinary tests of truth. It declares that a royal charter

[1] Vis. VII. 2; ज्ञातं मयेति लिखितं दावा—Sc., p. 129, अध्यक्षाक्षरैर्युतम् (Vyāsa); —Sc., p. 129.

स्वनाम तु लिखेत् पश्चात्—Sc., p. 128.

[2] एतच्च राज्ञा प्रतिग्रहीत्रे समर्पणीयम्—Viram., p. 194.

राज्ञा दत्तं शासनाख्यं स्यात्, एतच्च प्रतिग्रहीतुः समर्पणीयम्—Sc., p. 128.

[3] II. 226. [4] IX. 232.

free from the use of vulgar expressions and accompanied by possession on the part of its holder, bearing the king's seal and sign-manual and other marks is to be regarded as genuine.[1] According to another text a document provided with the king's *svahasta* and sealed with his own seal is equal to an attested document in all affairs.[2] Evidently such documents were in ancient times judicially recognised without any question as to their genuineness. A text of Prajāpati also goes to corroborate this view. It says that royal charters are by all means to be admitted in evidence for the decision of doubtful matters; they do not require any other formal proof except the fact that they bear a seal and a sign-manual.[3] The reason of the extra-ordinary degree of confidence placed in all public documents are not far to seek. First they emanated from the highest authority in the land and secondly all possible care was taken to give them a wide publicity. We find some *smṛti* texts which lay down that a royal grant should contain an address made by the king to the officials, the messengers, the physicians, the *mahattaras*, the relatives and even the *mlecchas* and *caṇḍālas* in the land to the following effect: 'I for the increase of religious merits of my father and mother and of myself make this grant to-day to so and so, son of so and so who belongs to the Vedic school so and so.'[4] Other *smṛti* texts[5] inform us that the king was to declare in the grant itself for the information of future kings and ministers that the grant would hold good till the sun and moon lasted and that it was to descend by right

[1] मुद्राङ्कं क्रियाङ्कं भुक्तिङ्कं सचिह्नकम्। राज्ञः स्वहस्तसंयुक्तं यद्धिमायाति तत्क्षणात्। क्रियाङ्कनपदशब्दानन्वयादिरहितम्।—Sc., p. 146.

[2] राज्ञः स्वहस्तसंयुक्तं स्वमुद्राचिह्नितं तथा। राजकीयं स्मृतं लेख्यं सर्वेष्वर्थेषु सिद्धिमत्।
—Vīram., p. 195.

[3] कार्यो यत्नेन महता निर्णयो राजशासनात्। राज्ञः स्वहस्तो मुद्रालेखकाक्षरदर्शनात्।
Vīram., p. 199.

[4] Pds., p. 123.

[5] Sc., p. 127.

of inheritance to the son, grandson, and more remote descendants and that it was never to suffer any reduction or be repudiated and that it was entirely exempt from all *bhāvyas*.[1] He was also to declare that the reward of making a gift was residence in paradise for sixty thousand years and the punishment of repudiation was condemnation to hell for the same period. We know further that the grant was to contain a request from him to all future kings for the making of gifts in the following verse :—

सामान्योऽयं धर्मसेतुर्नृपाणां
काले काले पालनीयो भवद्भिः
सर्वानेतान् भाविनः पार्थिवेन्द्रान्
भूयोभूयो याचते रामभद्रः ॥[2]

A royal charter is essential, as Devaṇabhaṭṭa observes, not to complete or validate a gift, for a gift is valid as soon as the donee approves of it. It is necessary in so far as it serves to make a gift recorded in it permanently endurable.[3] Yājñavalkya speaks of making a royal grant permanent. What he means by it is, Devaṇabhaṭṭa points out, that the gift registered in such a grant should be made permanent.[4] These grants were intended undoubtedly to have effect of title and in fact copper-plate grants are themselves the actual title deeds and certificates. Viśvarūpācārya says that a gift of land may be made permanent by *bhūmicchidranyāsa*.[5] *Bhūmicchidranyāya* is the expression generally occurring in the inscriptions. This

[1] Jolly accepts the reading *bhāga* for *bhāvya* and explains it as diminution by the allotment of shares to the king's attendants and so forth.

[2] Sc., p. 127.

[3] एतच्च शासनं न दानसिद्ध्यर्थम्। तच्च प्रतिग्रहेणैव सिद्धेः। किन्तु दानस्य स्थैर्यकरणार्थम्।
—Sc., p. 128.

[4] अनेनैवाभिप्रायेण याज्ञवल्क्येनाप्युक्तम्, स्वहस्तकालसम्पन्नम्।—Sc., p. 128.

[5] भूमेश्छिद्रन्यासेन—Bālakrīḍā on Yāj. I. 320.

term has not been explained by any one satisfactorily. The expression *bhūmicchidra* is found in Kauṭilya's *Arthaśāstra* and it means according to Prof. Shām Śāstrī 'division of land.'[1] Bühler quotes three lines from Yādava's Vaijayantī and explains that *bhūmicchidra* means land unfit for tillage.[2] *Bhūmicchidranyāsa* as used by Viśvarūpācārya may be understood to mean placing holes (ditches) in the land. These holes or ditches might have served as boundary marks for the lands given.

A technical rule in connection with a royal edict is that it should be written in a refined language, *i.e.*, Sanskrit, and be free from all vulgar and ungrammatical expressions. Authorities all agree that it should never be written in a local dialect.[3]

Jayapatra.

When a person gets possession of a movable or immovable property by means of adequate proofs or when he becomes victorious in a dispute regarding partition or is acquitted from a grave accusation, then the king who might have tried the case personally or through the chief judge should give him a decree which is called *jayapatra* (*lit.* a document of success).[4] A *jayapatra* should generally comprise the matter adduced to be proved, the answer or the written statement, the judge's ruling as to on whom the burden of proof should lie and his decision.[5] It should bear the royal seal and be signed by the chief judge

[1] Kau. II. 2.

[2] Epigraphia Indica, Vol. I, p. 174, भूमिच्छिद्रं कृष्ययोग्या, etc.

[3] राजशासनवच्च साधुशब्दनियमोऽत्रेत्यभिप्रायः—Mit. on Yāj. II. 89.
सुलिप्यनपशब्दोक्तिः। इदञ्च साधुशब्देरेव लेखनीयं न लौकिकवत्तदनियमः।—Vīram., p. 193.

[4] Vīram., p. 194 ; Pds., p. 124 ; Sc., p. 129.

[5] Mit. on Yāj. II. 91.

and other *sabhyas* or members of the tribunal.[1] Kātyāyana ordains that the king as well as the *sabhāsads* (the judges) should give their *svahastas* or sign-manuals to it in accordance with the general rules for writing documents.[2] As to what matters should be contained in a *jayapatra* we should look tha verse of Vyāsa which runs as follows :—[3]

proo

पूर्वोत्तरक्रियापादं प्रमाणं तत्परीक्षणम् ।
निगदं स्मृतिवाक्यं च यथा सभ्यदिनिश्चितम् ।
एतत् सर्वं समासेन जयपत्रे विलेखयेत् ।

Mitramiśra points out that owing to the separate mention of the word *pramāṇa* which means proof, *kriyā* should be taken in a different sense. It may be taken in the sense of *pratyā-kalita*[4] which means nothing but the deliberation of the judges as to on which party the burden of proof will lie.[5] *Nigada* means the depositions of witnesses.[6] So the verse just quoted declares that a *jayapatra* should contain the plaint, the answer, the deliberation of the judges as to on whom the burden of proof should lie, proofs and their examination, the depositions of witnesses and last of all the injunctions of the legal treatises as interpreted by the members of the judicial tribunal. Kātyāyana has two verses on the subject. Both of them seem to suggest that there should be a definite order to be followed in putting the contents in a *jayapatra*. But as there is no agreement between these two verses as regards the contents, the order suggested by them is not also identical. Thus one of them says that the first thing to be placed in a *jayapatra*

[1] Mit. on Yāj. II. 91.
[2] Sc., p. 130.
[3] Viram., p. 194 ; Sc., p. 129 ; Pds., p. 124.
[4] प्रमाणस्य पृथग्ग्रहणात् क्रियापदेन प्रत्याकलितमत्र गृह्यते ।—Viram., p. 194.
[5] अर्थिप्रत्यर्थिनोः कस्य क्रिया स्यादिति परामर्शलक्षणस्य प्रत्याकलितस्य ।—Mit. on Yāj. II. 8.
[6] निगदः साक्षिवचनम् ।—Sc., p. 130.

should be the plaint and the answer and then the deliberations of the chief judge and other *sabhyas* or members of the tribunal or the members of the corporation as the case may be ; then should be put the view of the legal treatises on the subject-matter of the suit in question and last of all the concurrence of the judge.[1] A Hindu judgment shows that this concurrence was expressed by some such expression as *sammatiratra* and followed by the signature of the judge giving the concurrence in his own handwriting.[2] The other verse of Kātyāyana declares that the contents of a *jayapatra* should be the pleadings, the deposition of each and every one of the witnesses, the manner in which the suit is decided and the actual decision of the suit. All these should find place in a *jayapatra* one after another in the order indicated, in pursuance of the rules for writing documents in general.[3] Raghunandana thinks that the purpose of putting all these things in a *jayapatra* is to show that the judgment has been thorough in all respects.[4] The utility of some of the contents of a *jayapatra* is also felt, Raghunandana further thinks, when the question of retrial comes up. Thus the prayer of the defeated party for a retrial with a plea quite different from that taken by him previously as revealed by the *jayapatra* will not be entertained. To put it in a concrete form, when the *jayapatra* shows that he was defeated by the submission of *mithyottara* (plea of denial) his application for a retrial with *kāraṇottara* (plea of special exception) will be disallowed.[5] In like manner an application for a retrial is also

[1] Sc., p. 130.

[2] 'A judgment of a Hindu Court in Sanskrit'—Calcutta Weekly Notes, Vol. XXIV, No. 38.

[3] Vt., p. 60. One of the meanings of the term *akṣara* is document and hence *yathākṣaram* evidently means 'according to the rules of document.'

[4] ... निरूपणस्य सम्यक्त्वप्रदर्शनार्थम् ।—Vt., p. 60. See also Vi. setu in MS.

[5] तथा हि मिथ्योत्तरलिखनं हेत्वन्तरेण पुनर्जयपत्रव्यवस्थाननिषेधार्थम् । न हि गृहीतमिति मिथ्योत्तरेण पराजितस्य पुनः परिशोधितं मयेति प्रत्यवस्थानं सम्भवति ।—Vt., p. 60.

to be rejected when it is seen from the *jayapatra* that the proofs proposed to be adduced are of different kinds from those by which decision was previously arrived at.[1] Now in the absence of any mention of reply and proofs in the *jayapatra* it would have been impossible to ascertain what kind of reply the defendant gave on the previous occasion or what kind of proof was resorted to. The value of a *jayapatra* as a whole is also immense to a defendant when he takes the plea of *res judicata*. Because according to Bṛhaspati and Vyāsa it is one of the principal means by which this plea can be substantiated.[2]

Jayapatra seems to have several varieties and one of them is mentioned in a text of Kātyāyana. This text declares that when the complainant establishes his case by adducing evidence the *jayapatra* given to him is called *paścātkāra*. We quote the text below :—

निरस्ता तु क्रिया यत्र प्रमाणेनैव वादिना ।
पश्चात्कारो भवेत् तत्र न सर्वासु विधीयते ॥[3]

Devaṇabhaṭṭa points out that the word *pramāṇa* in this text indicates that the term *paścātkāra* may be applied to a *jayapatra* only when the four parts of a judicial proceeding are in existence and recorded in it.[4] When there are only two parts, that is to say, when on account of the submission of *satyottara* by the defendant, adducement of proof and *pratyākalita* (deliberation as to on whom the burden of proof will lie) become

[1] प्रमाणलिखनन्तु पुनः प्रमाणान्तरेण न्यायनिषेधार्थम् ।—Vt., p. 60.

[2] उत्तरे न्यायतुर्ये तु समाधिजयपत्रकम् (Br.) । प्राङ्न्यायोत्तरे साधिजयपत्रयोरन्यतरेणासाधयन् वादी न प्राग्विजयीत्यभिप्रायः ।—Sc., p. 119.

प्राङ्न्याये जयपत्रेण प्राड्विवाकादिभिस्तथा । सत्यं वादी समाप्नोति यद यत्रैव निवेदितम् । (Vyāsa), —Sc., p. 119.

[3] Sc., p. 131.

[4] प्रमाणेनैवेति वदंश्चतुष्पादव्यवहार एव पश्चात्कारो न द्विपादव्यवहार इति ।—Sc., p. 131.

unnecessary, the record of victory containing these two parts, namely the plaint and the answer should be called *jayapatra* and not *paścātkāra*.[1]

The term *pascātkāra* occurs also in the Arthaśāstra of Kauṭilya in the following rule :—

घाताभियोगमप्रतिब्रवतस्तदहरेव पश्चात्कारः ।[2]

Prof. Shām Śāstrī has taken the term in the sense of 'sentence of punishment' and rendered the passage as follows :—

'Sentence of punishment shall be passed the very day that a defendant accused of assault fails to answer the charge made against him.'

We think, however, that the term *paścātkāra* occurring in the Arthaśāstra is not far different in meaning from that of the Dharmaśāstra. For the true meaning of the rule just referred to we should look elsewhere. It is laid down in the Yājñavalkyasmṛti that in a capital offence, theft, assault and abuse, where a cow is the cause of action, in slander and aggression, in a law-suit where the character of a woman is involved or where the right over a slave girl is disputed, the defendant should be made to answer the charge immediately.[3] Kātyāyana also echoes the spirit of this rule by saying that the proceedings should be speedy and immediate in actions done very recently.[4] Interpreting Kauṭilya's rule in the light of the texts of Yājñavalkya and Kātyāyana we may take *pascātkāra* in the sense of judgment. The rule would then mean that the judgment should be passed the very day the defendant fails to answer the charge of assault against him. We fully agree, on these grounds, with Prof. Julius Jolly that *pascātkāra* of Kauṭilya seems to contain a reference to the

[1] द्विपादव्यवहारे तु भाषोत्तरान्वितं जयपत्रमध्येव ।—Sc., p. 131.

[2] Kau. III. 19.

[3] Yāj. II. 12.

[4] सद्यः कृतेषु कार्येषु सद्य एव विवादयेत्—Vivādacandra (in MS.), Vi. tāṇ (in MS.) and Sc., pp. 94 and 95.

jayapatra of Dharmaśāstras.[1] The real importance of the mention of *pascātkāra* in the Arthaśāstra then should not be lost sight of. It undoubtedly serves as an evidence of the great antiquity of Indian *jayapatras*.

The Mitākṣarā mentions another kind of document *hīna-patra* by name.[2] We know from a text of Kātyāyana that contradiction, hostile attitude towards the witnesses and the judges, non-appearance, silence and abscondence after being summoned—these are five of the causes of non-suit.[3] We know further from some legal texts that the party non-suited, though he will not forfeit his claim to the subject-matter of the suit, is liable to be punished.[4] Now in order to punish him on some future occasion a judgment of non-suit is to be put on record and such a record is called *hīnapatra* by the Mitākṣarā perhaps in contradistinction to *jayapatra*.[5]

From a text of Bṛhaspati and the interpretation put on it by Devaṇabhaṭṭa it appears that a record of defeat was sometimes awarded to the defeated party and it was also named *jayapatra*.[6] Asahāya more appropriately calls it *parājayapatra*.[7]

[1] Calcutta Weekly Notes (A Javanese Jayapatra), Vol. XXV, No. 32.

[2] Mit. on Yāj. II. 91.

[3] अन्यवादी क्रियादोषी नोपस्थाता निरुत्तरः।
आहूतप्रपलायी च हीनः पंचविधः स्मृतः॥—Mit. on Yāj. II. 91 ; Vi. tan (in MS.).
सभ्याश्च साक्षिणश्चैव क्रिया द्वेधा मनीषिभिः
तां क्रियां दूषयेद् यो मोहात् क्रियादोषी स उच्यते।

[4] शास्योऽप्यर्थान्न हीयते (Mit. on Yāj. 16); हीनवादी दण्ड्यो भवति न प्रकृतार्थादीयते।—Mit. on Yāj. II. 91.

[5] तच्च कालान्तरे दण्डप्राप्त्यर्थम्—Mit. on Yāj. II. 91.

[6] Sc., p. 131; अन्यवाद्यादिहीनेभ्यः।

[7] वादिप्रतिवादिनोः सभ्यैरेकवाक्यतयोद्धरितजयपराजयपत्रप्रकटीकृतनिर्णयम्। The extant Sanskrit text reads साक्ष for पत्र, but Jolly seems to prefer the reading पत्र. (S. B. E., Vol. XXXIII, 65).

We cannot conclude this topic without a reference to the judgment of a Hindu Court which is contained in a *jayapatra* edited by Mr. K. P. Jayaswal.[1] This judgment, besides showing how a *jayapatra* was generally written, what were to be its contents and how they were to be arranged, amply illustrates the rules of judicial procedure as obtained in ancient India. It shows also, Mr. Jayaswal points out, 'how stiff, severe and dignified, technical, methodical and scrupulously formal a Hindu judgment used to be' and 'how the provisions of Hindu law were applied in actual administration of law.' Another remark of Mr. Jayaswal made in a separate and illuminating article on this judgment will bear repetition; 'the procedure followed in Hindu Courts in respect of civil trials was as precise as is observed to-day in any modern Court of law in any part of the civilised world. We are apt to regard the present system of laws and its administration as a recent revelation to the new world. But the remnants of the laws and literature that have survived foreign invasions in India are progressively convincing us every day that the political and legal institutions of ancient India could by no means compare unfavourably with those that have replaced them in modern times.'[2] The matter under the judgment is an original suit brought by one Tularam Sarman jointly with his co-sharers against Maninath Sarman for getting possession over a domestic slave girl. The defendant wins the case and the *jayapatra* is given to him. In it are first mentioned the names of the parties in full. Then it records the gist of the plaint and the nature of the answer given to it by the defendant. Then follow the deliberations as to on which party the burden of proof should lie. As the defendant submits a *mithyottara* it is ruled that the plaintiff is to be put on proof. Issues are next

[1] Calcutta Weekly Notes, Vol. XXIV, No. 38.

[2] Calcutta Weekly Notes, Vol. XXIV, No. 37.

settled and adjournments dealt with.[1] The plaintiff's proposal to call in a single witness is disallowed on the authority of Dharmaśāstras. Then the defendant prays for permission to resort to the proof of ordeal and this also is not granted on the authority of legal treatises. After all these the plaintiff is declared to have lost his case. A very important point of law regarding the proof of possession which we shall have occasion to refer to is also discussed. All these things are put in the *jayapatra* one after another. It is in the handwriting of and signed by the chief judge (*prāḍvivāka*) and addressed to other judges who form the tribunal. They also sign it and declare their 'concurrence herein' (*sammatiratra*). The *jayapatra* is full of references to the precepts of celebrated sages, learned disquisitions and subtle arguments on many principles of Hindu law and everything done in it is in strict accordance with the directions of the Hindu law texts.

Another *jayapatra* deserves mention in this connection.[2] It is not in Sanskrit but in ancient Javanese. It formed the subject-matter of a Dutch paper by Dr. Brandes, the substance of which is given by Prof. Julius Jolly in an interesting article in an issue of the Calcutta Weekly Notes. A special importance attaches to this Javanese *jayapatra* mainly for the reason that the rules of Javanese law-books, as pointed out by Dr. Brandes, tend to corroborate the close relationship of Javanese law with the Dharmaśāstras of India. 'Thus the four parts of a judicial proceeding in Javanese law, *viz.*, the plaint, declaration, pleadings and judgment are very similar to, if not identical with, the four parts of an Indian trial, *viz.*, plaint, answer, examination and judgment. The rule that making default in the court causes loss of one's suit may be traced to the maxim of

[1] Here the plaintiff makes default and is nonsuited; but he does not lose his claim to the subject-matter of the suit. Proceedings, therefore, are in re-trial. This is in accordance with the ruling of the Mitākṣarā.

[2] C. W. Notes, Vol. XXV, No. 32.

Nārada (I. 2. 32) that he who takes to flight after receiving the summons shall lose his suit. The rule regarding the *jayapatra* or document of success, which the successful party (or both parties) is to receive from the Court, whenever the sentence has been pronounced in accordance with the law-book, agrees with the ruling of the smritis, *e.g.*, where Vṛddha Vaśiṣṭha states that the successful plaintiff after having proved his cause, shall be given a *jayapatra* and where Bṛhaspati ordains (VI. 3), that the whole transaction in a suit shall be recorded in the document stating the success (of the claimant or defendant).'

In modern law the following documents are regarded as public documents :—[1]

(1) Documents forming the acts or records of the acts—

(*i*) of the sovereign authority,

(*ii*) of official bodies and tribunals, and

(*iii*) of public officers, legislative, judicial and executive, whether of British India, or of any other part of His Majesty's dominions or of a foreign country;

(2) Public records kept in British India of private documents.

The modern law further holds that the contents of public documents may be proved by their certified copies. Here is an exception to the rule requiring primary evidence to be given and it rests 'on the ground of inconvenience.' All people are entitled to inspect public documents and may require them for evidentiary purposes. 'So if the production of their originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time but the continual change of place would expose them to be lost and the handling from frequent use would soon insure

[1] Woodroffe and Ameer Ali, The Law of Evidence, p. 526.

their destruction. For these and other reasons their contents are allowed to be proved by derivative evidence at the risk, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual.'[1]

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[1] *Ibid*, p. 532.

CHAPTER III

Possession

'आगमेऽपि बलं नेव भुक्तिः स्तोकापि यत्र नो ॥'[1]

'Where there is not the least possession, there the title is not weighty.' This is how the importance of the proof of possession is recognised by Yājñavalkya. Vijñāneśvara understands this statement to mean that transfer of ownership is not complete without the transfer of possession. We give here the substance of the gloss he puts upon it. "By whichever of the derivative means a property is acquired, proprietary right to it is created only when it is accepted by the acquirer. The loss of property by the original owner is implied finally by this acceptance. Now acceptance may be effected by a mental, a verbal and a physical act. What is meant by the mental act? The will to accept. The verbal acceptance is distinguished from the mental by such formal declarations as 'I accept,' 'This is mine' and the like. The acceptance by a physical act consists in actually taking the thing in question by the hand or formally touching it. The conveyance is completed by this last act. In the case of landed property the acceptance by a physical act as described above is not practicable and is to be signified by the assumption of possession and an actual enjoyment of the produce of the land after it has been transferred. The legal form of transfer of an immovable property is not complete until and unless possession is taken over in respect of it by the transferee."[2]

[1] Yāj. II. 27.
[2] Mit. on Yāj. II. 27.

The verse in Nārada's text bearing upon the point is as follows :

विद्यमानेऽपि लिखिते जीवत्स्वपि हि साक्षिषु ।
विशेषतः स्थावराणां यत्र भुक्तं न तत् स्थिरम् ॥[1]

'Though a document be in existence and witnesses living, that is no true property of which possession is not actually held. This is specially true as regards immovables.' Nārada evidently intends to show the weakness of proof by witnesses and documents where the proprietary right of an immovable property is in dispute. Asahāya in commenting on this verse raises another point of law, *viz.*, generally any of these three kinds of proof is invalid where it is not accompanied by any of the other kinds.[2] The proposition that a transfer of ownership is not complete without delivery of possession does not mean, however, that the latter is an essential condition for the former. What Vijñāneśvara means by it is that delivery of possession puts a title on a sound basis and enhances its value. He describes only the usefulness of possession by saying that a title unaccompanied by physical acceptance consisting in the assumption of possession and consequent enjoyment of the produce is weaker than a title accompanied by such an acceptance.[3] This too will be the case, he adds, when of these two it is not known which is anterior or which is posterior in point of date. When it is known, then the prior title though deficient in not being accompanied by possession will be regarded as a stronger evidence than the title which is accompanied by it but posterior.[4] Viśveśvara in his Subodhinī makes it clear that

[1] Nār. I. 77.

[2] एकैकं प्रमाणमप्रमाणम् । यदुभयप्रमाणसम्पन्नं वस्तु तदविचलं प्रमाणमिति...—on Nār. I. 77.

[3] फलोपभोगलक्षणक्रियाविकलस्वीकारविकल आगमो दुर्बलो भवति तत्सहितादागमात्···
—Mit. on Yāj. II. 27.

[4] एतच्च द्वयोः पूर्वापरकालापरिज्ञाने, पूर्वापरकालपरिज्ञाने तु विगुणोऽपि पूर्वकालागम एव बलीयानिति
—Mit. on Yāj. II. 27.

the rule cannot be otherwise. We all know that mortgage is one of the means of acquiring title. Now suppose a plot of land is mortgaged to a person who has by chance not the possession of it. The same plot of land is mortgaged a second time and possession delivered to the mortgagee. Now if it be the rule that title with possession is invariably superior to one without possession then the second mortgage will prevail over the first one and thus the rule that in the case of pledge, gift or sale the prior contract has the greater force will have no meaning at all.[1] The texts of Yājñavalkya and Nārada do not promulgate therefore that delivery of possession is an indispensable element for a valid transfer but only point to the risky nature of the transfer of ownership without the transfer of possession. It is undoubtedly true that when a transferee continues to remain without any control over the property transferred to him for a long time, it may give rise to the presumption that he has parted with his title in favour of the person in actual possession of the same.

We have already seen it mentioned that possession is an independent means of proof. Its value, therefore, cannot lie merely in augmenting the force of title. It thus requires to be seen under what circumstances it can independently be a proof. As this question is closely connected with another, *viz.*, the question of the general relation existing between the proof of possession and the proof of title, we shall first of all try to ascertain this relation. The relation between the two may be characterised in a word as one of mutual support. We have just seen that title in order to be able to prove ownership is to be attended with possession. Title is to that extent supported by possession. There are several *smṛti* texts which declare that possession also

[1] ननूपभोगसहितागमापेक्षया भोगसहितागमस्य दुर्बलत्वे यवैकमेव चेतमेकस्याधीकृत्यान्यस्याधीकरोति तव यदि दैवात् पूर्वस्य भोगाभावः उत्तरस्य भोगोऽस्ति तादृग्यपि स्थले भोगरहितागमस्य दौर्बल्यं स्यात्। तथा चाधौ प्रतियहे क्रीत इत्यादि वचनविरोधः स्यादित्याशङ्क्याह एतच्च द्वयोरित्यादिना।

in order to be proof of right by itself should be based upon title. Bṛhaspati says that only that possession which is founded on a legitimate title such as grant, inheritance, purchase or hypothecation can prove right,[1] and further that it is not by mere force of possession that land becomes a man's property ; it becomes property only when legitimate title also has been proved and not otherwise.[2] Hārīta and Nārada are also very emphatic on the point that possession without title is no proof at all. Hārīta shows the complete dependence of possession on title by describing title as the root and possession as the branch of a tree.[3] In the opinion of Nārada possession acquires validity by the production of a clear title and when it is without title it does not constitute proof of ownership.[4] He further says that he who can only plead possession without being able to adduce any title has to be considered as a thief in consequence of his pleading such an illegitimate possession.[5] He ends by saying that title is required to prove proprietary right even when there is enjoyment consequent upon possession.[6]

The sum and substance of what has been said is that a person pleading possession is required to prove that it has a legal origin also, or in other words that he has acted under a good title. In this sense possession is to be supported by title. The relation of their mutual support is vividly described by a text attributed to Pitāmaha. This text declares that possession is no proof without title and title is no proof without possession ; each of them becomes a proof only when it is helped by the other.[7]

[1] Vīram., p. 203, ...भोग: सागम: सिद्धिमाप्नु यात्।
[2] Sc., p. 161, मुक्त्वा केवलया नैव... etc.
[3] आगमस्तु भवेन्मूलं भुक्ति: शाखा प्रकीर्तिता—Sc., p. 160.
[4] Nār. IV. 85.
[5] Nār. IV. 86.
[6] Nār. VI. 84.
[7] Sc., p. 161.

The nature of each individual case will determine which of them is to preponderate over the other. The text of Yājñavalkya declares that generally title is to prevail over possession unless the latter is hereditary.[1] Nārada also expresses the same idea by saying that for the first acquirer gift (*i.e.* a good title) is a cause.[2] The Mitākṣarā explains that when the first acquirer is impeached after a short period of his acquisition there is nothing to prove his ownership except his title-deed. A good title the soundness of which is proved by documents and witnesses affords a stronger evidence in his case than mere possession.[3] What the commentary wants to say is that if a person proves his possession over a property but cannot show how he acquired it, and another although not in possession proves his title by showing that he acquired the property in some recognised way of acquiring ownership such as sale, gift, etc., then the title so proved will prevail over possession under ordinary circumstances. For an intermediate claimant, however, Nārada lays down, *bhukti* (possession) which is *sāgamā* (based on a legitimate title) is a stronger proof than title.[4] By the expression 'intermediate claimant' is meant a possessor up to the third generation excluding the original acquirer. This we know from the following text of an anonymous *smṛti*-writer. 'Up to the third generation from the acquirer possession is the principal thing to be looked into but it should be ascertained at the same time that it has a clear title behind it.'[5] The exact relation between possession and title therefore may thus be briefly indicated: when possession is for a comparatively long period it will prove right but not quite independently of title; title will have to help it. But when possession is for a

[1] Yāj. II. 27.

[2] आदौ तु कारणं दानम्—Mit. on Yāj. II. 77 and Vm., p. 344.

[3] आद्ये पुरुषे साक्षिभिर्भावित आगमो भोगादभ्यधिको बलवान्...—Mit. on Yāj. II. 27.

[4] मध्ये मुक्तिस्तु सागमा—Vm., p. 344.

[5] तस्यैवाक्रतीयस्य प्रभुर्भुक्तिः स्फुटागमा—Sc., p. 172.

short period its usefulness will lie in strengthening title which will be the main thing to rely on ; or in other words, when possession is comparatively modern so much importance should not be attached to it as to title when ownership is sought to be proved.

We thus see and it is expressed in so many words by the Vivādacandra that possession when modern and at the same time unaccompanied by title does not constitute an evidence of property.[1] When, however, it is proved to be ancient its value is immensely increased. Thus one of the main conditions of effective possession is that it should be long-continued (*dīrghakālā*).[2] The expression *dīrghakālabhoga* seems to correspond to *tripuruṣabhoga*. We have already referred to the text of Yājñavalkya which states that title is a more powerful evidence than possession when it is unaccompanied by hereditary succession (*pūrvakramāgatabhogāt vinā*). The Mitākṣarā takes *pūrvakramāgatabhoga* as meaning *tripuruṣabhoga*,[3] *i.e.*, possession continued through three successive generations in the past. We shall see later on what the exact significance of this latter expression is. It may, however, be stated here that *tripuruṣabhoga* does not import anything very different from possession that has come down from time immemorial, that is to say, from possession which has its beginning not within human recollection (*smārtakāla*).[4] Yājñavalkya's rule evidently provides for an exception in favour of such a possession. Thus the Mitākṣarā comments that the superiority of title over possession intends a case within human memory and the exception applies to cases beyond it. In cases falling within the memory of man it is possible to produce

[1] न्यूनकालभोगो निरागमो न प्रमाणम्।

[2] Vm., p. 342.

[3] पूर्वेषां पितादीनां त्रयाणां क्रमः पूर्वक्रमस्तेनागतो यो भोगः—Mit. on Yāj. II. 27.

[4] तत्रापि क्रमात्त्रिपुरुषागतमित्यस्यास्मार्तकालोपभोगलक्षणम्—Mit. on Yāj. II. 27.

a title if such a title really exists and hence if it is not produced it may give rise to a presumption of its non-existence.[1] Here an enquiry into the question of title is not superseded by possession. But when possession is being held from time immemorial it cannot be said that there is no title merely because it is not produced. Here the strength of presumption in favour of legitimate title is greatly increased by the length of the time of enjoyment and hence the proof of title is rendered superfluous. Herein we get an answer of the question 'When can possession be an independent means of proof ?'

Now what is the meaning of the expression *smārtakāla* (a period of human memory) ? The Mitākṣarā understands it to cover a period of one hundred years[2] which is considered to be the utmost extent of human life on the authority of the Vedic text **शतायुर्वै पुरुषः** (the life of a man extends over hundred years). This commentary evidently takes the extreme range of human memory into account and thus the period fixed may justly be called a period of legal memory in contradistinction to that of living memory. We shall just see that a similar if not an identical period is intended to be signified by *tripuruṣabhoga* (possession passing through three generations). Such a possession has been much extolled by our *smṛti*-writers and is given the same importance in law as immemorial possession. It is said that when a property has already been enjoyed by three generations and passed to the successor fourth in descent the fact of his mere inheriting the property is sufficient proof of his right and no title is required to be produced. Thus says Viṣṇu 'the land enjoyed by three immediate ancestors passes to the fourth in descent even without a document.'[3] Bṛhaspati also is not for enquiring into the title when possession has

[1] आगमोऽभ्यधिको भोगादिति च स्मार्तकालविषयम्···, etc.—Mit. on Yāj. II. 27.

[2] स्मार्तकालो वर्षशतपर्यन्तः—Mit. on Yāj. II. 27.

[3] V. 183.

already passed three generations.[1] *Tripuruṣabhoga* has been thus defined by Vyāsa, 'when a property being enjoyed by the great grandfather passes at his death to the grandfather and after his death to the father, then after the death of the father too, the son's possession may be termed 'possession continued through three successive generations.'[2] To put it in a simpler form, when a property has already passed three ancestors one after another, the possession of the fourth in descent is technically called *tripuruṣabhoga*. The rule that a person having such a possession is not required to produce title to have his ownership established seems to be contradicted by another text of Bṛhaspati which seems to declare that the possession by three generations *when accompanied by documents* makes an evidence of property.[3] There is, however, no real contradiction, for this rule of Bṛhaspati applies, according to commentators, to cases where three generations do not exceed the period of human memory.[4] It becomes thus evident that the period of possession for three generations does not signify the exact period during which such a possession may actually be held. It has been rightly observed by the Mitākṣarā that sometimes three generations may be finished even within a year and if it be accepted as a rule that mere continuance of possession through three generations without any reference to time is sufficient to establish proprietary right, then it would follow that second year's possession even being unaccompanied by title affords evidence and thus it will be contrary to the spirit of the rule which declares that within the period of human recollection possession accompanied by title only may prove ownership.[5] The conclusion therefore is that a specific period of time is

[1] Sc., p. 167.
[2] Vt., p. 50.
[3] Sc., p. 169.
[4] तत् स्मार्तकालानतिक्रान्तत्रिपुरुषभोगविषयम्—Sc., p. 169.
[5] Mit. on Yāj. II. 27.

meant by the expression 'possession for three generations.' We may call it a prescriptive period. It is thus recognised that possession already held by three generations one after the other is also not sufficient evidence of property without length of time. The length of the period which has been taken as an equivalent of *tripuruṣabhoga* (possession for three generations) is different according to different authorities. According to Bṛhaspati possession for one generation covers thirty years and thus the possession for three generations means at least a period of ninety years.[1] An anonymous *smṛti*-writer thinks that such a period is to cover one hundred and five years.[2] Vyāsa and Kātyāyana consider twenty years for one generation quite sufficient and thus according to them sixty years constitute the period of *tripuruṣabhoga*.[3] We have already remarked and our remark is fully borne out by a text of Kātyāyana that possession extending over three previous generations imports a possession which has not its beginning within human memory.[4] It follows therefore that the period of human recollection should be the same as that of the possession of three previous generations. But we have seen that the period of human recollection has been taken to be one hundred years. It should, however, be remembered that Vijñāneśvara has computed this period not on the basis of any legal text but from a Vedic text which seems to have very little connection with the subject of law. The difference between several text-writers as to the period of *tripuruṣabhoga* may be explained by a consideration of time and place.

Jīmūtavāhana who accepts the view of Kātyāyana and Vyāsa regarding the period of *tripuruṣabhoga* expresses the opinion that if three generations be living then possession for

[1] Pds., p. 142.

[2] Pds., p. 142, Sc., p. 164 ; वर्षाणि पञ्चविंशत्तु पीरुषो भोग इष्यते ।

[3] Sc., p. 172, and Vīram., p. 206.

[4] *i.e.*, within 60 years ; Vīram., p. 206.

sixty years even will not be regarded conclusive. The reason is that in such a case ownership is still with the original acquirer and thus the significance of the term *tripuruṣabhoga* is totally absent there.[1] Thus neither mere possession for three generations without length of time nor the length of time without actual possession by three immediate ancestors will prove ownership. The proof of ownership in the absence of title requires therefore that there should be a possession for the full prescriptive period (*i.e.*, the period of *tripuruṣabhoga*) and further that this period should see the demise of three immediate ancestors one after another.

It must be understood, however, that unauthorised or *malafide* possession, however long it be, is not sought to be recognised by such a rule as ripening into legal title. Long-continued possession presumes the existence of title only when the non-existence of its contrary (*i.e.* of *āgamābhāva*) is practically certain. Thus, as the Mitākṣarā puts it, possession is a proof independently of the knowledge of title but not of its existence.[2] When possession is long-continued the existence of title may, however, be inferred from it. Thus the whole thing being analysed comes to this : title is inferred to exist at least in certain circumstances from possession and possession as a rule becomes proof being coupled with the existence of title. The Subodhinī observes that this process does not give rise to the fault which goes by the name of *anyonyāśraya* (interdependence) for title is presumed to exist not directly from possession but from *arthāpatti* (implication) being propped up by a consideration that long-continued possession cannot be accounted for otherwise.[3]

[1] ...प्रपितामहस्यैव तच्च स्वातन्त्र्यात्तस्यैव भोग: ।—Viram., p. 341.

[2] तत्राप्यत्यन्तागमं विनेति अत्यन्तमुपलभ्यमानमागमं विनेति व्याख्येयं न पुनरागमस्वरूपं विनेति —Mit. on Yāj. II. 27.

[3] नन्वेतदनुपपन्नमन्योन्याश्रयप्रसंगात् तथाहि प्रमाणभूतेन भोगेनागमसत्तावगति: आगमसत्तायामवगतायां तत्सहकृतस्य भोगस्य प्रामाण्यमिति । उच्यते चिरकालोपभोगानुपपत्तिरूपयार्थापत्त्यागमसत्तावगति:...इति साक्षात् प्रामाण्यभूतेन भोगेनागमसत्ताया अनवगमात् नान्योन्याश्रयप्रसंग: ।

When, however, there is a positive knowledge of bad title or traditional proof of the absence of title, possession for hundreds of years even will not serve as a proof of right. On this principle, the Mitākṣarā explains, is founded the rule :

अनागमं तु यो भुङ्क्ते वर्षान्यब्दशतान्यपि ।
चौरदण्डेन तं पापं दण्डयेत् पृथिवीपतिः ॥[1]

'He whose possession is proved to extend over hundreds of years even, without a title, the ruler of the earth will inflict on that sinner the punishment of a thief.' In this connection it becomes necessary to take into consideration two more verses, one of Nārada and the other attributed to Hārīta, which are as follows :

अन्यायेनापि यद्भुक्तं पित्रा भ्रात्राऽथवाऽपि च ।
न तच्छक्यं पराहर्तुं तृतीयं समुपागतम् ॥[2]

अन्यायेनापि यद्भुक्तं पित्रा पूर्वतरैस्त्रिभिः ।
न तच्छक्यमपाहर्तुं क्रमात्त्रिपुरुषागतम् ॥[3]

Here तृतीयं समुपागतम् in the first verse should be explained as तृतीयमतिक्रम्य समुपागतम् and पित्रापूर्वतरैस्त्रिभिः in the second verse as पित्रा सह पूर्वतरैस्त्रिभिः[4] and thus the apparent meaning of these texts will be this : when possession has been successively held even unlawfully (अन्यायेनापि) by three ancestors of the present possessor in respect of a certain property, it cannot be taken away from him for the simple reason that it has already passed through three lives. This is how Asahāya explains Nārada's verse taking the expression अन्यायेनापि as implying absence of title.[5] Asahāya's explanation is supported after all

[1] Nār., I. 87.
[2] Hārīta in Sc., p. 168.
[3] Nār. IV. 91 ; Sc., reads पराहर्तुं for अपाहर्तुम् ।
[4] Mit. on Yāj. II. 27. and Sc., p. 168.
[5] अन्यायेनापि विनागममपि—Asahāya on Nār. IV. 91.

by another text of Hārīta which declares that possession held by three successive ancestors makes good evidence of property even if there be no title.[1] The defect of this interpretation is that it goes to contradict the rule just referred to, *viz.*, that when a person enjoys a property the title of which is known to be non-existent, he shall be punished like a thief even if his possession can be traced back to a very early period. Vijñāneśvara seems to say that the contradiction is more apparent than real, for the real import of the two verses just quoted is not what it appears to be. The word *api* used therein indicates that if a property cannot be alienated when possession in respect of it is even illegal, it follows *a fortiori* that it cannot be alienated when there is no certainty of illegality.[2] So according to him these texts only emphasise that in order to rebut a presumption created by long possession it is necessary for the opposite party to show either from his own knowledge or from the knowledge of others that such a possession had no *bona fide* beginning or to be more clear, that it had not commenced in a legal mode of acquiring property. Devaṇabhaṭṭa's explanation also is not very different from that of Vijñāneśvara in substance. He says that the rule **अनागमं तु यो भुङ्क्ते**, etc., should be taken as referring to a case where the absence of title is absolutely certain[3] and thus his idea about the two other texts is that they are to apply where there is no certainty about the absence of title, or in other words, when there is no recollection of the time when such a title did not exist. The import of the expression **अन्यायेनापि** as given by him is that a possession passing through three generations in the past is a good evidence of property and

[1] यदिनागममत्यन्तं भुक्तं पूर्वैस्त्रिभिर्भवेत् ।
न तच्छक्यमपाकर्तुं क्रमात्त्रिपुरुषागतम् ॥—Mit. on Yāj. II. 27.

[2] 'अन्यायेनापि यद् भुक्तं' इत्येतच्चान्यायेनापि भुक्तमपकर्तुं न शक्यं किं पुनरन्यायानिश्चये इति व्याख्येयमपिशब्दश्रवणात्—Mit. on Yāj. II. 27.

[3] तद् येन केनचित् प्रमाणेन निश्चितानागमभोगविषयम्—Sc., p. 169.

such a possession is even incapable of being characterised as unlawfully held, what to speak of the alienation of the property possessed.[1] It thus appears that Devaṇabhaṭṭa takes these two texts merely as *arthavādas* in praise of possession for three generations. Sūlapāṇi takes these texts in a quite different light. He reads **अनागमम्** instead of **अन्यायेन**[2] in the two texts of Nārada and Hārīta and says that these two texts are of the Dharmaśāstra, while the text prescribing punishment for wrongful possession belongs to the Arthaśāstra and as such the former are to prevail over the latter according to the maxim 'Dharmaśāstra is to be regarded as of greater authority than Arthaśāstra when there is a conflict between the two.'[3] Thus it seems that in his opinion possession for three generations even when based on bad or no title will be a sufficient proof of right. It should here be noted that the jurists who have been characterised by Vācaspati as *navya*, *i.e.*, belonging to the new school of thought, did entertain exactly such a view. Vācaspati tells us that in the opinion of these jurists sixty years' possession, which, it should be remembered, covers according to some authorities the period of *tripuruṣabhoga* (possession for three generations) is a very conclusive proof of ownership even when the absence of title is well known.[4] Raghunandana thinks that the text of Nārada prescribing punishment for possession without title refers specially to the possession of such property as *strīdhana* (woman's property) and *nṛpadhana* (king's property).[5] His authority for this explanation is another verse of Nārada which states that the property of a woman and of the king is

[1] तदन्यायेनेति वक्तुमशक्यं किं पुनरपह्नर्तुम्—Sc., p. 168.

[2] अन्यायेनेत्यत्रानागममिति मूलपाठिभृतपाठः—Vt., p. 52.

[3] Vt., p. 53.

[4] आगमाभावनिश्चयेऽपि यस्याब्दिको भोगः स्वत्वे प्रमाणम्। अन्यायेनापि यद् भुक्तं पिता पूर्वतरैस्त्रिभिरितिस्मरणादिति नव्याः।

[5] Vt., p. 53.

never alienated though possessed for hundreds of years without clear title.[1] This explanation would certainly not be liked by the *āgamavādin*, because according to them a good title is necessary not only in the case of *strīdhana* or *nṛpadhana* but in all kinds of properties.

It is indeed very interesting that we find the subject of ancient possession briefly discussed in the *jayapatra* which we have already referred to[2] and which contains a decision from a Hindu tribunal composed of several Judges. The view taken by the Judges about the applicability of the rule **अनागमम्**, etc., does not go much against that of the Mitākṣarā or of the Smṛti-candrikā. It is held by them that this rule is to apply when there is a total want of title.[3] They express the opinion, however, that, in order to make the trespasser liable to be punished this want of title requires to be ascertained at some previous occasion. Thus if it is decided after a short time of a man's assuming possession of a property that he has no real title to it and inspite of that if he continues to enjoy the property by stealth or by force then his enjoyment will not be an evidence of his right even after a very long period and he will be punished; but if the want of title has not been previously decided then its contrary, namely the existence of title will be presumed from long-continued possession; or in other words, possession and enjoyment which are acts of ownership will be regarded as the best proofs of title in that case.[4] It is further pointed out that possession can be a proof of ownership

[1] Nār. I. 83.

[2] Calcutta Weekly Notes, Vol. XXIV, No. 38.

[3] न चेवमनागममित्यादिवद्विधवचनव्याघात इति देश्यम्। तस्य निश्चितागमाभाववदवस्तु-विषयकत्वात्।

[4] प्रकृते प्रत्यर्थिनः स्वत्वे यथोक्तभोगरूपागमनिश्चयसत्त्वात् वस्तुतस्तु चौरेत्यादिश्रवणात् न्यूनतमभोगे भोगकर्तुः स्वत्वाभावनिश्चये विवादकाले याते पश्चात् बलवद्बलात्कारादिना शतवर्षाधिकं भुक्तवस्तुविषयत्वं तेषां वचनानामिति प्रतीमः।

not only when it is attended with a title, for in that case it would not have been spoken of by the authorities as an independent means of proof at all.[1]

The various explanations and counter-explanations of the legal texts referred to make it clear that there were two schools of thought among our jurists. We may call them *bhuktivāda* school and *āgamavāda* school. So far as the *bhuktivāda* is concerned, it is very old and we have seen that its history goes back to the time of Asahāya. It remained in abeyance for a long time and came to be recognised not long before Vācaspati. This is evident from Vācaspati's giving the epithet *navya* to the *bhuktivādins*. They maintained that possession when proved to be long-continued was a *prima-facie* evidence of property. They did not think it necessary to presume a legal origin from such a possession but on the contrary went so far as to say, of course on the authority of some legal texts, that a possession that has passed through three immediate ancestors was quite sufficient for the fourth in descent to prove his right even if such a possession was known to have no title at all. Among the later *bhuktivādins* we may name Śūlapāṇi and Raghunandana. Among the *āgamavādins* on the other hand stand prominent Vijñāneśvara, Jīmūtavāhana, Vācaspati and Devaṇabhaṭṭa. According to the *āgamavādins* a title or at least a knowledge of the absence of its non-existence was essential to establish right and possession alone, however ancient, was quite powerless as against the total absence of title when known. They really found it difficult to understand how the right of the real owner could be destroyed by its non-assertion and how possession which was known to be illegitimate could by mere continuance change its character and become a proof of right after a certain period.

[1] कथमन्यथा सागमसमानभोगप्रमाणे प्रमाणपार्थक्येन भोगप्रामाण्यं मुनयो निबन्धकाराश्चोदाजह्रुः।

[2] IV. 92.

As a matter of fact cases of illegitimate possession are not rare and we find some of them mentioned in a text of Nārada. When a certain thing is deposited with a third person to be delivered ultimately to its owner, the thing so deposited is termed *anvāhita.*[1] If the person with whom such a thing is deposited enjoys it as his own for a very long time he or his heir cannot claim proprietary right to it on the grounds of prescription and long user, because title is known to be absolutely absent there. Similary stolen goods, ordinary deposit, what is held by force, loans for use and what is enjoyed during the absence of the owner—these are things possessed without title.[2] The idea is that when a possession is known to have begun from an illegal source length of time cannot give it the stamp of legality. In determining the legality of possession under a gift the intention and right of the donor also should be taken into account. If it is proved that the donor, even if he be the king himself, acted illegally in respect of the gift made by him, the plea of long-continued possession taken by the donee against the real owner will be of no avail. Saṁvartta and Nārada are very emphatic on this point. Saṁvartta says ' when the king out of wrath or greed, or showing some semblance or reason gives the property of one to another, the donee, though he enjoys it for a long time, cannot acquire title to it.[3] Nārada says "the immemorial possession of a thing acquired by the unjust and illegal favour of the king even cannot produce ownership in respect of it."[4]

We know from some authoritative legal texts that possession in order to be a proof of right is to conform to five conditions. Besides being titled and long-continued, it should be uninterrupted, uncontradicted and held within the observation of the

[1] Mit. on Yāj. II. 67.
[2] Asahāya on Nār. IV. 92.
[3] Sc., p. 170.
[4] Sc., p. 170.

adverse party.[1] Devaṇabhaṭṭa observes that all these conditions should combine in order to place possession on a strong basis. He goes on to say that when any of them is found wanting possession will lose much of its force as a proof of right.[2] Another *smṛti* text requires that that possession should be *sāmantopetā*, that is to say, known to the neighbouring landholders.[3] This requirement may be explained on the ground that the value of possession as a proof is naturally much increased when attended with certainty and notoriety.

Bṛhaspati describes the value of uninterrupted possession by saying that if a person's possession has been continuous from the time of acquisition and has never been interrupted for a period of thirty years, he should not be deprived of the property possessed.[4] We know further from him that when a possession is unjustly and illegally interrupted, the right acquired is not destroyed and the possessor is not left without remedy. He may undertake to prove his right by means of documents, the depositions of persons knowing him to be the possessor and other witnesses. In a dispute of this kind those persons should be witnesses who know the name (of the country in which the land in dispute lies), the boundary of the land, the title of acquisition, the measure of the land, the time of its acquisition, the region in which that particular land is situated and above all the cause of interruption.[5] It has also been said by Bṛhaspati that interrupted possession even can be regarded as valid if it has been substantiated by an ancestor, *i.e.*, if a previous possessor has adduced a legitimate title.[6] In this Bṛhaspati agrees with Vyāsa who also says that when a particular

[1] Viram., p. 204. Sc., p. 161.
[2] पञ्चाङ्ग इति वदन् एकाङ्गैकल्येऽपि चबलमात्रमेव भोगस्येति—Sc., p. 162.
[3] Sc., p. 160.
[4] Viram., p. 204.
[5] Viram., p. 222.
[6] Pds., p. 145, Sc., pp. 170 and 171.

ancestor has proved his title to a property his sons and successors cannot be ousted from it on any ground.'[1]

Much stress has been put upon the proposition, as pointed out above, that possession, especially when it is modern, does not afford any presumption of ownership. This has very materially affected the question of burden of proof. Thus when a plaintiff seeks to eject a defendant from property of which the latter is in possession and to obtain possession thereof for himself the burden of proving his ownership is on the defendant. This is evidently due to the absence of any presumption in his favour. The rules laid down by Nārada and Bṛhaspati are quite convincing on this point. Nārada says, 'when an occupant is impeached by an opponent who calls himself the legitimate owner, the former is to refute the charge. For possession proves right only when it has been inherited from an ancestor who has already established his right.'[2] Bṛhaspati also says, 'the land is not to be taken away from the son of the first acquirer who being sued *has established his right by adducing proof*.' He further opines that when the first acquirer is sought to be ousted he is to prove his title by documents and witnesses and when it is once done his sons, grandsons or other heirs will be quite safe and in their case possession will alone prove their respective rights.[3] It is also stated both by Yājñavalkya and Nārada that if an usurper or other person makes a claim against the present possessor and if the present possessor dies in the course of the law-suit pending against him, the burden of proving ownership by the production of title-deeds or by means of the depositions of witnesses will fall on his son or heir.[4] The plea of uninterrupted and long possession,

[1] Sc., p. 171.
[2] Nār., IV. 90.
[3] S. B. E. (Vol. XXXIII, p. 313).
[4] Nār. IV. 93 ; Yāj., II. 29.

तस्य दिक्षी पुत्रादिक्रमागममनुहरेत्। यस्यापत्य तस्मिन् व्यवहारे मुक्तिरागमरहिता साक्ष्यादिभिः साधिताऽपि न प्रमाणम्—Mit. on Yāj. II. 29.

if taken, will be quite futile. On this Devaṇabhaṭṭa comments that possession held already by three generations even will be of no avail in deciding such a law-suit. For, possession by three generations is evidence only when it is uncontradicted. So a person whose three generations have already passed being in possession of the property in dispute will be under the necessity of proving his right in respect of it by having recourse to documents and witnesses.[1]

When a title-deed being lost cannot be produced in court the possessor in order to have his ownership established will have to prove first that his possession has so long been adequate in all other respects. That is to say, he will be required to show that it has been uninterrupted, uncontradicted, held for a long time and known to the adverse party. He will have to make a statement to the effect that he came into possession at such a time, that such is the quantity of the thing possessed and that such and such were the means by which he acquired title to it.[2] The fact of his possession and all these collateral circumstances will best be proved by witnesses and the persons most competent to be witnesses in this case will be the peasants, headman of the village and the owners of the neighbouring lands.[3]

Turning to the English law on the subject we find that our law compares very favourably with it. Hindu law obviously bases the operations of long enjoyment on a presumption of legal origin, a presumption which had long been absent in the old English law and was introduced only after Littleton. The

[1] तमागमं चतुर्थादिरवश्यं समुदरेत्। यस्मात् स्वतन्त्रा भुक्तिस्तावन्मात्रम्। चविनीतत्वाभावात् इत्यर्थः—Sc., p. 172.

[2] Sc., p. 162.

[3] भुक्तिप्रसाधने मुख्याः प्रथमं तत् क्रमीबलाः।
यामस्थसीमसामन्तास्तत् सन्धापयतः क्रमात्॥—Sc., p. 162.

English lawyers continued, however, to adopt enjoyment from time immemorial (*i.e.*, from time whereof the memory of man runneth not to the contrary) as the basis of their law and after the statute of Westminster had fixed a time of limitation they by an equitable construction of the same fixed upon a point of time, *viz.*, the first day of the reign of Richard I (A.D. 1189) as the furthest limit of human memory by which 'every prescriptive claim was deemed indefeasible if it had existed from that date and to be at an end if shown to have had its commencement since that date.' It must thus be admitted that the protection afforded by the English law to long enjoyment was not so certain and effectual as that afforded to it by the Hindu law. Under the former the difficulty of strictly proving the exercise of a right up to the time of Richard I, must have become greater and greater with each successive generation on account of the possible loss of evidence consequent upon the lapse of time, while under the latter this difficulty was much lessened by the fact of the period of legal memory being reduced to a certain period of years which did not make the attainment of evidence absolutely impossible. The judges about the end of the 18th century tried to improve the condition of the English law by introducing the presumption of a lost grant, but this contrivance was thought inconvenient on various grounds and it became apparent that the evil could only be remedied by legislation. As a consequence was passed the Prescription Act of 1832 by the provisions of which the presumption of legal title arising from an enjoyment extending over a certain period of years and fulfilling certain other conditions obtains a conclusive character.[1]

[1] Best on Evidence, pp. 352-372.
See also Sen's Hindu Jurisprudence, pp. 122-123.

Adverse Possession.

The principal text which relates the effect of adverse possession is that of Yājñavalkya. The text is as follows :—

पश्यतोऽब्रुवतो भूमेर्हानिर्विंशतिवार्षिकी ।
परेण भुज्यमानाया धनस्य दशवार्षिकी ॥[1]

'He who sees his land possessed by a stranger for twenty years and his personal estate for ten years without any opposition or verbal protest will incur a loss (*hāni*) in respect of them.' The word *dhana* in the text refers to properties other than land and includes all kinds of movable possessions, such as cow, horse, elephant and the like.[2] So the plain meaning of Yājñavalkya's text is that when movable property is enjoyed for ten years and immovable property for twenty years adversely, the owner will be put under a certain loss if the enjoyment takes place uncontradicted and with his knowledge. As the matter relates to a worldly concern, the years have to be calculated, Raghunandana thinks, on the basis of a solar month, *i.e.*, a month of full thirty days.[3]

There is another text and it is of Bṛhaspati, which fixes the period required for ripening adverse possession at thirty years.[4] Śrīkaramiśra who is undoubtedly an earlier jurist than Jīmūtavāhana reconciles this text with the text of Yājñavalkya.[5] He holds that the expression *abruvataḥ* in Yājñavalkya's text is sufficient to indicate that the rule

[1] Yāj. II. 24.

[2] धनस्य तु इत्यत्रादेः—Mitākṣarā.
एवं भूम्यतिरिक्तस्य धनस्य—Aparārka.
धने च गवादौ—Vm., p. 342.
धनस्य गवादेः (Vācaspati).

[3] अत्र लोकव्यवहारकर्मत्वात् वर्षगणना सावनेन—Vt., p. 46.

[4] Vm., p. 342.

[5] Vm., p. 342.

contained in this text will apply when there is even no verbal protest to the enjoyment of the stranger. In the text of Bṛhaspati, on the other hand, occurs the expression *avighātinī* instead of *abruvataḥ*. *Vighāta* means obstruction in the shape of *kalaha* (quarrel) or *melaka* (assembly) and hence the occasion for the application of Bṛhaspati's rule will arise when there is verbal protest but no quarrel or organised effort to recover the lost possession.[1]

A great deal of discussion has centred round the verse of Yājñavalkya and the opinion of our jurists are sharply divided as to the true import of the expression *hāni* (loss). There are mainly three different theories that have clustered around it, and we may name them the theory of the loss of property (*svatvahāni*), the theory of the loss of remedy (*vyavahārahāni*) and the theory of the loss of usufruct (*phalahāni*).

There are other theories also. Many of these theories we find recorded in the Manubhāṣya of Medhātithi[2] and are thus very old. We shall presently see that commentators and digest-makers of later times tried to explain the text of Yājñavalkya just quoted on the basis of one or other of these theories.

The theory of *svatvahāni*—According to this theory adverse possession of a property for the prescribed period held to the knowledge of the owner but without any protest or opposition from him extinguishes his title to it. This theory is very old and was known to Medhātithi. We may trace it back to Asahāya, who is considered by J. Jully as the oldest of the writers of Law Bhāṣyas. Asahāya in commenting on verse I. 78 of Nārada distinctly says that title may be extinguished by adverse possession held for a long period.[3] This commentator

[1] पश्यतोऽनुवत इति निर्देशात् वाङ्मात्रेणाप्यविरोधे मिश्रितवचनं बोद्धव्यं मिश्रहर्षवचने त्वविघातिनीति श्रुतेर्मिश्रितो घातः विघातः कलहमेलकादिरूपः स यत्र नास्ति वाचनिकमात्रन्तु विद्यते तदिषय इत्यविरोधः।
Vm., p. 342.

[2] On Manu VIII. 148.

[3] स्वकीयानर्थान् द्विपदचतुष्पदस्थावरादिकान् प्रीतिसमर्पितबलात्कारग्रहीतयुत्थाक्रान्तादिप्रपञ्चैः परैर्भुज्यमानानुपेक्षते। तस्य जीवतोऽपि चिरकालातिक्रान्ता भुक्तिस्तान् परार्थानेव वशीकुरुते।

further expresses the opinion, and it is based on the expression *tūṣṇīm* occurring in the next verse of Nārada and similar in meaning with *abruvataḥ* of Yājñavalkya's text, that when such a possession is contradicted, that is, when, though unable to obtain possession of the property, the party kept out of possession asserts his right every now and then in opposition to the stranger, then his title will not be lost.[1]

Medhātithi raises the following objections against the theory of the loss of property :[2]

1. Possession does not lead to ownership but it is ownership that leads to possession.

2. The text of Yājñavalkya, if understood in this light, will in reality be in conflict with the texts of Nārada which declare that (*a*) enjoyment without title even for hundreds of years makes the enjoyer liable to be punished like a thief, and (*b*) title should form the real ground of ownership and not possession.

3. There are other texts which declare that if a property has been in the possession of strangers for three generations, then and then only it is lost to the original owner. If ten or twenty years' adverse possession is regarded quite sufficient to destroy the right of the original owner, then the texts in favour of possession for three generations will have no meaning.

Jīmūtavāhana also raises the question of conflict between the text of Yājñavalkya understood in the light of the theory of *svatvahāni* and those texts which lay down that possession for three generations only may serve as proof of right. He adds further that the position taken up by Śrīkaramiśra that ten or twenty years' possession in order to be able to create ownership requires to be held with the knowledge of the owner, while possession for three generations will create ownership in the

[1] प्रतिवचः प्रतिदिनं प्रतिमासं प्रतिवर्षं च करोति ततः कालान्तरेऽपि तस्य न प्रणश्यति ।

[2] Medh. on Manu VIII. 148.

possessor even if it is held without his knowledge, is untenable in the face of the text of Vyāsa which declares that possession in order to be an evidence of right ought to be among other things uninterrupted and held with the knowledge of the original owner. [1] It may be noted here that Jīmūtavāhana sustains the position that an owner who has been kept out of his property without his knowledge ought not to lose his title thereto. [2] It has further been suggested by some, Jīmūtavāhana informs us, that ten or twenty years' possession is in reality a very strong evidence of property for the simple reason that it cannot be accounted for otherwise and *tripuruṣabhoga* (possession for three generations) indicates only a possession for a period in excess of that and nothing more. [3] This suggestion does not deserve any serious notice evidently for the reason that the definite mention of *tripuruṣa* (three generations) in various texts would lose all its significance. Jīmūtavāhana ends by saying that the views of those who maintain that *pramāṇatva* in relation to 'possession' does either signify creation of right or is indicative of something else in its favour are to be discarded. [4]

Viśvarūpa attacks the theory of the loss of right from another standpoint. The extinction of the title of one person will necessarily imply the creation of title in another person. Now, it may be asked, Viśvarūpa seems to say, who is that another person to be ? Is it the possessor ? It cannot be so, because he himself knows fully well that he is holding possession of the property not belonging to himself but to a quite different person and as such proprietory right, if it is to go to him, will in a way be thrust upon him. Will the right then pass to the king on the ground that the king is to become the owner of an ownerless property ? Viśvarūpa

[1] Vm., pp. 342 and 343.

[2] Vm. ii.

[3] Vm., p. 347.

[4] किञ्च प्रमाणतं करणत्वमुपलक्षणत्वं वा इत्युभयवादी हेय एव ।—Vm., p. 347.

maintains that there is hardly any reason for the original owner kept out of possession to be deprived of his right.[1]

Vijñāneśvara's arguments against the theory of the loss of right are mainly based on a consideration of the means of acquiring ownership. He says if it be admitted that ten or twenty years' adverse possession is sufficient to invest the possessor with ownership when the owner omits to assert his right, then it must also at the same time be admitted that non-assertion of right on the part of the owner and enjoyment on the part of the possessor are among the sources of acquisition of ownership. The absurdity of such a position is apparent, for neither of these two has been recognised as a lawful means of acquiring property. Possession, Vijñāneśvara further points out, is merely an evidence of right and not the creator thereof.[2]

The theory of *Vyavahārahāni*—According to this theory Yājñavalkya's text promulgates loss of remedy to the owner on the ground of his passiveness when his property has been adversely enjoyed for ten or twenty years. This theory is elaborated by Viśvarūpa [3] and apparently owes its origin to the following text of Nārada :

उपेक्षां कुर्वतस्तस्य तूष्णीभूतस्य तिष्ठतः ।
काले विपत्रे पूर्वोक्ते व्यवहारो न सिध्यति ॥ [4]

'The suit of a person practising indifference and remaining silent does not succeed after the expiry of the prescribed period.' The distinction between *upekṣā* and *tūṣṇīmbhāva* is that the former implies the absence of physical efforts and the latter of

[1] Bālakrīḍā, p. 211.

[2] Mit. on Yāj. II. 24.

[3] हानिवचनन्तु निन्दामात्रे नोपेक्षकस्य व्यवहारप्रस्थयोग्यतामात्रन्निष्फलम् ।
—Bālakrīḍā, p. 211.

[4] Quoted in the Mitākṣarā on Yāj. II. 24.

verbal protests.[1] It is evident that these expressions correspond to *paśyataḥ* and *abruvataḥ* in Yājñavalkya's text. The main point of Viśvarūpa is that non-resistance and absence of protests on the part of the owner within the limited period are the causes of his losing remedy against the adverse possessor. Loss of remedy (*vyavahārahāni*) means not the total failure of remedial measures that the ousted person may adopt for the restoration of his right, because in that case loss of remedy will involve loss of property and thus there would practically be no difference for him between the two. By it should be understood therefore, Devaṇabhaṭṭa makes it clear, the loss or defeat in a law-suit from human modes of proof.[2] To be more explicit, the text of Yājñavalkya explained on the basis of *vyavahārahāni* enunciates that by remaining passive for ten or twenty years in respect of a property which is being adversely enjoyed, the owner loses the advantage of having his right restored with the aid of human proofs. It is, however, open to him to establish his right by means of the divine mode of proof.[3] This view is supported by a *smṛti* text which declares that documents and witnesses are of no use in the matter of proving a claim against the adverse possessor.[4]

Aparārka seems to be almost of the same view. In his opinion the loss of title resulting from adverse possession is due to a presumption of legal ownership on the part of the possessor and of the absence thereof on the part of the party dispossessed.[5] This statement about the loss, he continues, is, however, not from the standpoint of the direction the property is to take

[1] उपेक्षामित्यनेन शरीरव्यापारशून्यत्वं तूष्णीमित्यनेन वाग्व्यापारशून्यत्वम्।
—Bālambhaṭṭi, p. 100.

[2] मानुषप्रमाणात्तस्य स्वार्थो न सिध्यति।—Sc., pp. 156 and 157.

[3] तेनात्र न धर्मांख्यनिर्णयवशादुपेक्षकस्य हानिः।—Sc., p. 156.

[4] अभुक्तिरागमो मोघो भुज्यमाने परैरपि। आगमशब्देनात्र तत्प्रमाणीभूतलिखितसाक्षिणावुक्तौ।
—Sc., p. 157.

[5] Aparārka, p. 631.

but from that of the course of *vyavahāra*.[1] Now *vyavahāra* means a legal procedure founded on human evidence, *i.e.*, deposition of witnesses and documents.[2] What Aparārka means to say therefore is that so far as the court acting on human evidence is concerned, it will be guided by a presumption of ownership on the part of the person in enjoyment and give verdict to him and thus will not give any relief to the dispossessed owner. To this extent the dispossessed owner is put under a loss. Aparārka does not advocate divine means of proof for the restoration of his right but says that for this the moral compunctions of the stranger should be relied on. For apart from legal questions there are moral considerations also. So the stranger who knows fully well that the property which he is enjoying belongs in reality to another, though it has been acquired by him through *vyavahāra*, should return it to its owner from fear of committing a sin.[3] The conclusion on the whole seems to be that according to the theory of *vyavahārahāni* the text of Yājñavalkya contains a rule of limitation which is for the guidance of the court only but is not to operate by putting an end to the title of the real owner, the restoration of which can be effected either by some divine mode of proof resorted to by him or by depending upon the conscientious scruples of the stranger in possession.

The theory of *vyavahārahāni* is exposed to a severe refutation by Vijñāneśvara.[4] His point is that inaction (*upekṣā*) and silence (*tūṣṇīmbhāva*) apart from all other considerations cannot be regarded as sufficient grounds for the loss of remedy, because they may be due to causes over which an owner has no control such as idiocy and minority. These two have been specially

[1] एवञ्च व्यवहारस्थितिमाश्रित्योच्यते न भूमिगतिम् ।—Aparārka, p. 632.

[2] प्रमाणनिश्रितो यस्तु व्यवहारः स उच्यते । प्रमाणनिश्रितो मानुषप्रमाणनिश्रितः ।—Sc., p. 156.

[3] तथा च यत् परमार्थतः परकीयमेव व्यवहारेणैवार्जितं तत् प्रत्यवायभयादेव यथास्थानं गमयितव्यम् ।
—Aparārka, p. 632.

[4] Mit. on Yāj. II. 24.

mentioned by Manu and Nārada as the grounds in the absence of which only adverse possession may assert its force.[1] They both say that when the owner is neither an idiot nor an infant and if his property is adversely enjoyed in a place where he may see it, then only its recovery becomes impossible by legal procedure and it may pass to the person in enjoyment. Medhātithi observes that all the conditions which incapacitate a man to protect his interest are implied by the terms idiocy (*jadatva*) and minority (*apogaṇḍatva*). These conditions may include complete helplessness arising out of gambling or drinking, illness of a long duration, devotion to austerities and penance, natural inaptitude for litigation, want of the organs of speech, hearing and the like.[2] Vijñāneśvara says that when any of these causes of inaction and silence exists loss of remedy will not ensue and thus the intention of Manu and Nārada is to declare loss of remedy arising from the absence of the familiar causes of passiveness and not from mere passiveness or the absence of the exercise of right for any period. When any of these causes does not exist, as for instance, when the owner is neither an idiot nor an infant, the adverse possessor may justly take the following plea : 'the plaintiff is neither an idiot nor a child; in his presence I enjoyed the property for twenty years without interruption. Had I unjustly got possession of the property why did he remain indifferent and silent all the time ? To the truth of my assertion I have many witnesses.'[3] In such a case the plaintiff will be unable to rejoin and it appears probable that his defeat will ensue.[4] Vijñāneśvara says that this apprehension of the loss of remedy from the absence of the causes of inaction and silence is also groundless because a person is not to lose a suit only on

[1] Manu VIII. 148 ; Nār. IV. 80.
[2] Medh. on Manu VIII. 148.
[3] Mit. on Yāj. II. 24.
[4] Mit. on Yāj. II. 24.

the ground of his inability to rejoin.[1] It is laid down by Yājñavalkya that it is the duty of the king himself to investigate judicial proceedings in a *bonafide* manner, *i.e.*, according to the real circumstances of the case rejecting all ambiguities.[2] When nothing can be ascertained by judicial investigation even, then and then only the defeat of the person unable to meet the pleas of the adverse party will be declared.

Jīmūtavāhana's theory is also the theory of loss of remedy but with a slight variation. In his opinion the text of Yājñavalkya promulgates this loss not to the owner but to a person entering into a posterior contract of sale, gift and pledge as against a former purchaser, donee and pledgee.[3] In order to properly understand Jīmūtavāhana's interpretation of Yājñavalkya's text we should know something about what the latter says regarding the law of relative superiority in contracts. It is directed by Yājñavalkya that generally speaking in all disputes regarding contracts, the last act will be considered as of greater validity, but in the three instances of pledge, gift and sale the prior contract will have the greater force.[4] Thus, for instance, if a person having borrowed one hundred coins at one per cent. should agree to pay three per cent. at a subsequent period and if there exists evidence on both sides, the posterior act will supersede the prior one, that is to say, the contract of three per cent. will nullify that of one per cent. But if a person having pledged, given or sold a piece of land to one person for a valuable consideration should subsequently pledge, give or sell the same piece of land to another, superiority will be attached to the claims of the first pledgee, the first donee or the first purchaser as the case may be.[5] The twenty year text of Yājñavalkya,

[1] एव निरुत्तरस्यापि वास्तवो व्यवहारो भवत्येव ।—Mit. on Yāj. II. 24.
[2] Yāj. II. 19.
[3] Vm., p. 348.
[4] Yāj. II. 23
[5] Mit. on Yāj. II. 23.

according to Jīmūtavāhana, forms an exception to this rule. To be more explicit the text of Yājñavalkya should be interpreted, he says, as enjoining that though as a general rule a prior contract has greater weight in pledge, gift or sale, yet when the first pledgee, donee or purchaser allows with his full knowledge the landed property pledged, given or sold to him to be enjoyed by a new pledgee, donee or purchaser for a period of twenty years without any protest, then the posterior contract will prevail. In the case of pledge, gift or sale of a movable property, however, uncontradicted possession for ten years by the second pledgee, donee or purchaser with the full knowledge of the first pledgee, donee or purchaser will give the transaction of the former a greater force.

It is evident that this theory may better be called the theory of exception to the general rule regarding the relative validity of contracts. We may note here that this theory or at least a part of it, *viz.*, so far as it relates to pledge is very old as we find it mentioned and refuted by Medhātithi in his Manubhāṣya.[1] His argument against it is that the acceptance of a pledge involves a desire for possession and in the case of land specially the fact of its having been pledged cannot be established without possession.[2] It may be noted here that the Hindu law is not in favour of recognising the validity of a pledge which is not accompanied by possession.[3] So when a property is pledged the natural inference is that it is in possession of the pledgee and thus it does not matter if the pledgor ignoring his first transaction pledges his property a second time to another person during the period of its possession by the first pledgee. Medhātithi further observes that when the first pledgee owing

[1] Medh. on Manu VIII. 148.

[2] भूमिस्तु सर्वदा फलमेति। भोगलाभमन्तरेण न स्वत्वसिद्धिः।
—Medh. on Manu VIII. 148.

[3] Sen's Hindu Jurisprudence, Lecture VI. See Nār. IV. 125.
स पुनर्द्विविधः शोक्तो गोप्यो भोग्यस्तथैव च॥

to distraction of other business or distance of the place or on account of some other cause over which he had no control such as banishment by the king, serious illness, etc., has not been able actually to accept and take possession of the property pledged to him and if in the meantime it has been pledged to a second person by the pledgor then even the first pledgee will not be debarred from obtaining possession of the same provided he can prove his title to it.[1]

Vijñāneśvara refutes the theory as we find it developed by Jīmūtavāhana, author of the Vyavahāramātṛkā. As Jīmūtavāhana, author of the Dāyabhāga, is thought to have belonged to a later period than Vijñāneśvara[2] it must be assumed either that the author of the Vyavahāramātṛkā is a different person from the author of the Dāyabhāga or, what is more probable, that Vijñāneśvara attacks the very source from which the Vyavahāramātṛkā has drawn its own conclusion. Vijñāneśvara's contention is that all subsequent transactions in respect of a property with a person who has once pledged, given or sold it are in themselves invalid for the plain reason that he ceases to be the owner of such property just after the transfer is finished. Now if he pledges, gives or sells that property inspite of the fact that he has lost his interest in it, then he will be doing a highly illegal act by interfering with the right of the transferee and in the case of gift at least a penalty is prescribed for both the giver and acceptor of a thing over which there is no ownership on the part of the former.[3] What Vijñāneśvara wants to say is that all posterior transactions of pledge, gift and sale being invalid, possession on the part of the second pledgee, donee or purchaser, however long, continuous, peaceable and open it be, will not be regarded competent to call in question the right of

[1] Medh. on Manu VIII. 148.

[2] Tagore Law Lectures (Jolly), pp. 12, 21 and 22.

[3] यतस्तेषूत्तरैव क्रिया तत्त्वतो नोपपद्यते···न चाहितस्य दत्तस्य विक्रीतस्य वा स्वत्वमस्ति। अस्वस्य दाने प्रतिग्रहे च दण्डः स्मर्यते।—Mit. on Yāj. II. 24.

the first pledgee, donee or purchaser and hence the text of Yājñavalkya cannot be explained on the basis of the theory of exception to the rule of relative validity of contracts. Vijñāneśvara further goes on to say that if this ten or twenty year rule of Yājñavalkya be taken as an exception to the general rule regarding the relative validity of contracts in the three cases of pledge, gift and sale then the immediately following rule of Yājñavalkya will be irrelevant for the reason that it intends to exclude some cases from the operation of the ten or twenty year rule and the case of pledge is one of them.[1] The irrelevancy will thus occur at least in part.

There are other minor theories also.[2] According to one of them the text of Yājñavalkya prescribes the period of limitation in the matter of partition of property among brothers. Thus if a brother has not got equal share with his other brothers and has remained without any action for ten years in the case of movable property and twenty years in the case of immovable property, his application for the revision of shares will be dismissed. According to another theory limitation is prescribed in favour of the possessor of a piece of land which though previously uncultivated has been cultivated by him. After twenty years its extent cannot be checked. A third theory states that when two persons have equal interest in a piece of land and when they, though not related with each other, are inhabitants of the same place, have similar powers, similar wealth and are of similar disposition and if one of them allows the property to be enjoyed by the other for twenty years, then the former will be deprived of his right. This theory practically coincides with the theory of the loss of property with this modification that here the loss is not to be suffered by the owner in favour of a stranger but by a partner in favour of another partner.

[1] तथाध्यादीनां चयाणामपवादत्वेऽस्य श्लोकस्याधिसीमादीनामुत्तरश्लोके ऽपवादो नोपपद्यते।
—Mit. on Yāj. II. 24.

[2] Enumerated in Manubhāṣya of Medhātithi (VIII. 148).

Medhātithi rejects this theory on the ground of its incongruity with the rule in favour of possession for three generations. Medhātithi's theory about the text of Yājñavalkya is that it promulgates a loss for one aggressor against another. Thus when two persons are known to have no title over a property and are asserting themselves by mere force, the prior possession though of longer duration is set aside by ten or twenty years' possession which is more recent and free from all kinds of suspicion.[1] This commentator seems further to say that this text may also apply when one person has title and another person has open and uncontradicted possession for twenty years. In such a case the former will lose his interest in the property which will be presumed to have been given in pledge to the latter.[2] We know that pledge is one of the means of acquiring title and so what Medhātithi intends to say is that the loss of title for the owner is not due to his remaining indifferent for a certain period while his property is being adversely enjoyed, but is the result of the presumption of his giving the property in pledge to the person in possession. Bhavadeva also favours the doctrine of presumption but maintains that the presumption raised is one of abandonment on the part of the owner and appropriation on the part of the possessor.[3] Pradīpakāra adds that the presumption raised may either be of transfer or of abandonment on the part of the owner.[4] Mitramiśra criticises the views of Bhavadeva and Pradīpakāra and says that the doctrine of presumption cannot be sustained. The reason is that the period of ten or twenty years falls within the period of

[1] यद्योभावप्यागममन्तरेण भोगमात्रबलात् प्रभुत्वं तव पूर्वभोगचिरन्तनोऽपि विंशतिवर्षभोगेन साम्प्रतिकेन निरुपधिना बाध्यते।—Medh. on Manu VIII. 148.

[2] विंशतिवार्षिकभोगेऽन्तरादर्शितविषये बन्धरूपतामभ्युपगन्तुं युक्ता...
—Medh. on Manu VIII. 148.
See Dr. Jha's Manusmṛti, Vol. IV, Pt. I, p. 182.

[3] Vīram., p. 213.

[4] Vīram., p. 215.

human memory. Hence if there had been any transfer or abandonment on the part of the owner it would have been remembered. As it is not remembered so it must be inferred that the owner had neither transferred not abandoned his property. So the presumption of transfer or abandonment if raised at all is apt to be easily rebutted.[1]

Another theory is that the text of Yājñavalkya warns the owner against remaining indifferent in asserting his right, for if he does not do it while his property is being enjoyed by another he may give to the possessor an opportunity of bringing forth his claim in consequence of his enjoyment for the prescribed period.[2] Among the latter jurists Vācaspatimiśra seems to be much in favour of this theory. The sum and substance of this theory is that the owner should always be very careful in preserving the evidence of his title by asserting it in proper time as otherwise he may have to run the risk of losing his property.[3] This theory is apparently supported by a text of Vyāsa which states that a piece of land possessed in the presence of the owner without any opposition from him is alienated just as a cow becomes the property of another when it is not taken care of by its owner.[4] Vijñāneśvara refutes this theory by saying that if the text of Yājñavalkya is interpreted as conveying an injunction for the owner not to remain passive then there would be no satisfactory explanation for the special mention of ten or twenty years in the text, because it is clear that

[1] Viram., p. 216.

[2] यद्यपि न वस्तुहानिर्नापि व्यवहारहानिस्तथापि पश्यतोऽप्रतिषेधतो व्यवहारहानिशङ्का भवतीति तन्निवृत्तये तूष्णीं न स्थातव्यमित्युपदिश्यत इति।—Mit. on Yāj. II. 24.

[3] वस्तुतस्तु हानिबीधकस्मृतीनां प्रमाणपरिपालनकर्तव्यताविधिशेषत्वं तस्मात् स्वप्रमाणं सर्वथा परिपालनीयं न तूष्णीमासितव्यमित्यत्र तात्पर्यम्...Vyavahāracintāmaṇi (in manuscript).

[4] उपेक्षिता यथा धेनुर्विनापालेन नश्यति। पश्यतोऽन्यैस्तथायुक्ता भूमिः कालेन हीयते।
(Vyavahāracintāmaṇi).

The reading of the second line in Sc. is much better and it is as follows: पश्यतोऽन्यैरुथा भूमिर्भुक्ता तेन तु हीयते।—p. 155.

there cannot be any apprehension that adverse possession for such a period will raise any presumption in favour of the claim of the possessor on account of the fact that it falls within the period of human recollection.[1] The text of Vyāsa above referred to intends a case, we may assume, beyond the period of human recollection. We know that the *smṛti* writers have accepted it as a general principle that possession destitute of title is not an evidence of right within such a period.

The theory of *phalahāni*—After criticising several of these theories Vijñāneśvara sets forth his own. His theory is the theory of *phalahāni*. According to it loss of the profits accruing from the real and personal property is intended by the text of Yājñavalkya. Although the rightful owner may regain his property after ten or twenty years' possession (ten years in the case of movable and twenty years in the case of immovable property) by a stranger, he loses the intermediate profits. This loss is due to his fault of remaining indifferent. Vijñāneśvara further observes that such a loss also does not follow in all cases. When the profit remains in *status quo*, the owner does not lose his claim thereto, but when there is an absolute destruction of the profit from a consumption thereof, then and then only the owner's claim to it is forfeited.[2]

This theory, we know from the Vīramitrodaya, is not much liked by such later writers on law as the authors of Kalpataru, Ratnākara, Smṛtitattva and Smṛticandrikā. They are of opinion that loss not only of usufruct but of property itself is intended by the text of Yājñavalkya. Their arguments are that loss of usufruct which according to Vijñānēśvara follows from adverse possession must be said to be due either to the fault of the owner consisting in his omission to oppose the possession

[1] तच्च न स्मार्तकालाया मुक्तेर्हानिश्रद्धा कारणत्वाभावात् तूष्णीं न स्थातव्यमित्येतावन्मात्रावभिधित्सया त्रिंशतिवर्षमविवक्षितं स्यात्।—Mit. on Yāj. II. 24.

[2] भूमिधनस्य फलहानिरिह विवक्षिता न वस्तुहानिर्नापि व्यवहारहानिः...
—Mit. on Yāj II. 24. p. 137.

which is being enjoyed by another in his presence or to the authority of the text of *Śāstra*. To assert that the loss is the result of the owner's negligence to offer resistance cannot satisfactorily explain the utility of the mention of the specific period (ten or twenty years) in the text, for it is evident that there was such a negligence on the part of the owner before the expiry of such a period even. Now if the authority of the text is sought to produce the desired effect it must be seen first of all that the text itself is interpreted in its obvious sense. To explain *hāni* by *phalahāni* is undoubtedly far-fetched if not absurd. The obvious and natural meaning of the expression *hāni* is loss and used in respect of *bhūmi* it would mean loss of land or property itself.[1]

This is how the authors named above maintain that adverse possession fulfilling the required conditions has the capacity of extinguishing title not only to the usufruct but to the property itself. As a matter of fact we have other texts also which clearly indicate that acquisition and extinction of title may be effected by possession and enjoyment, that is, by prescription. We quote these texts below for ready reference :

अजडापोगण्डधनं दशवर्षभुक्तं परैः सन्निधौ भोक्तुः ।[2]

"The property of a person who is neither an idiot nor a minor having been used by strangers before his eyes for ten years belongs to him who uses it."

यत् किञ्चिद् दशवर्षाणि सन्निधौ प्रेक्षते धनी ।
भुज्यमानं परैस्तूष्णीं न स तल्लब्धुमिच्छति ॥[3]

"Whatever an owner sees enjoyed by others for ten years in his presence without any protest, that he shall never recover."

[1] Vīram., p. 212.

[2] Gau. XII. 34.
भोक्तुरेव स्वमिति नियोयते ।—Haradatta on Gau. XII. 34.

[3] Manu VIII. 147.
Nār. I. 79.

As in Yājñavalkya's text, so in these texts also ten years' enjoyment must be understood as referring to movable properties of small value. This we know from the commentaries of Medhātithi and Haradatta.[1] Haradatta says further that in such cases the presumption that the ownership of the property has passed to the possessor by any such means as purchase or gift will be raised by reason of the absolute passiveness of the owner for such a long period as ten years.[2] The point to be noticed is that the texts just quoted do not contain any ambiguous word like the text of Yājñavalkya and as such do not admit of different interpretations. The doctrine of extinctive prescription, that is, loss of title through dispossession for a particular length of time is after all not really in conflict with the text which prescribes punishment for unauthorised possession however, long it be. This text may be taken as referring to a case of trespass and indirectly insisting that possession in order to be a proof of ownership should have a valid origin, or to express it otherwise, that the usurper can never be the owner merely by lapse of time. This doctrine is not opposed also to the spirit of the texts in favour of possession for three generations. The interpretation of these texts by Śrīkara may be accepted as final. We have already seen that according to him possession continuing through three generations in order to prove title requires not to be held with the knowledge of the previous owner as possession for ten or twenty years does.[3] The rule that every possession should invariably conform to the five conditions, one of them being that it should be enjoyed in presence of the claimant, is indeed too exacting and may be regarded as setting forth an ideal case of possession only.

[1] यत् किञ्चिदिति दासीदासाभारभाण्डादि सर्वं गाह्यति।—Medh. on Manu VIII. 147. अत्र क्षेत्रविषये याज्ञवल्क्यः...Haradatta on Gau. XII. 34.

[2] स एव भोगः स्वामिनः सकाशात् दानादिरूपेण तस्य धनस्य निर्गतं सूचयति। कथमपरथैतावन्तं कालमेवमर्थमपरलोकं तूष्णीमासीतेति।—Haradatta on Gau. XII. 34.

[3] Vm., pp. 342 and 343.

Another text, and it is of Marīchi, limits the period of prescription to five years in respect of cattle, conveyance, ornaments and such other things that may be borrowed for use through friendship.[1] This text distinctly recognises extinctive prescription and to take it as referring to the loss of produce would be simply absurd. Moreover, if it be accepted as a general rule that loss of title cannot follow from dispossession then the various other texts which undoubtedly provide for exceptions to the rule of extinctive prescription cannot be explained. First of all we find Manu laying down that things such as a milch cow, a camel, an ox or a riding horse and an animal made over for breaking in are never lost to the owner if used with friendly assent.[2] Vyāsa adds that a thing is not also lost to the owner when it is adversely enjoyed by a *śrotriya*, a *rājapuruṣa* (the king's official) and friends and relatives.[3] Devaṇabhaṭṭa comments that the idea underlying is that there can be no prescription against the owner when he remains indifferent out of some consideration.[4] He quotes another text of Vyāsa which shows that the owner's consideration in remaining passive in respect of a *śrotriya* may be the acquiring of eternal merit, in respect of a *rājapuruṣa* it may be fear and in respect of friends and relatives it may be affection.[5] Pitāmaha expresses the same idea in a different way. He says that possession will assert its force only when the possessor is a stranger (*para*), but when he

[1] धेनुवाह्यालङ्करणं याचितं प्रीतिकर्मणा।
चतुःपञ्चाब्दिकं दैयमन्यथा हानिमाप्नुयात्॥—Pds., p. 148; Sc., p. 159.

[2] Manu VIII. 146.

[3] याज्ञाधर्मेण यद् भुक्तं श्रोत्रिये: राजपूरुषे:।
सुहृदभिर्बान्धवैर्वापि न तद्भोगेन क्षीयते॥—Pds., p. 149; Sc., p. 157.

[4] अनेन सकारणोपेक्षायां न कदाचिद्धानिरित्युक्तम्—Sc., p. 157.

[5] धर्मोऽक्षय: श्रोत्रिये स्याद् भयं स्याद्राजपूरुषे।
स्नेह: सुहृदबान्धवेषु भुक्तमेतैर्न क्षीयते॥—Sc., p. 157.
Pds. reads धर्मोऽक्षय: श्रोत्रियस्य चभयं राजपूरुषे—p. 139.

happens to be a near relative then possession for a very long time even will not deprive the owner of his right.[1] Medhātithi gives us a long note on the word *para* which occurs in a similar text of Manu already referred to.[2] Some earlier commentators have taken the word to mean 'those who are not collaterals and relatives.' Medhātithi says that this explanation is after all unsatisfactory for it is difficult to ascertain who are relatives and collaterals and who are not. If these terms be taken to imply relationship in general then there would be none fit to be designated *para* because some sort of relationship may be said always to exist between one and another. Medhātithi says therefore that *para* must be taken to imply everyone other than one's own self. Now there are texts in which wife and son are spoken of as one's own self and hence it is concluded that between husband and wife and between father and son only mere enjoyment on the part of one cannot be regarded as a ground of ownership against the other. He continues, however, to say that when they are separated then omission to assert right on the part of either of them will be a precluder of his ownership.[3] Authorities are also of opinion and it has already been noted that when the owner suffers under a disability such as minority, idiocy and the like, he is not to be affected by any adverse possession which he may be ignoring. The reason, according to the Mitākṣarā, is his minority or idiocy.[4] Protection is also to be afforded to women on account of, as the Mitākṣarā puts it, their ignorance and timidness (**अज्ञानादप्रागल्भ्याच्च**).[5] The real ground on which idiots, minors and women are exempted from the operation

[1] भुक्तिर्बलवती तत्र भोक्ता यत्र परो भवेत्।
स्वगोत्रे भोगिनां भुक्तिर्न शक्या शाश्वती नृणाम्॥—Sc., p. 158.

[2] Manu VIII. 146.

[3] Medh. on Manu VIII. 146.

[4] जडबालयोर्जडत्वाद् बालत्वादुपेक्षा युक्तैव—Mit. on Yāj. II. 25.

[5] Mit. on Yāj. II. 25.

of the rule of prescription is that they do not know their own interest and thus deserve protection from law. The texts of Manu and Yājñavalkya further provide that there cannot be prescription against the properties of the *rājā* and of the *śrotriya*.[1] Medhātithi says that *rājā* means 'rulers of provinces.' Now these people have vast properties which it is impossible for them to watch over carefully and thus they will shortly be reduced to poverty if they are to lose their properties one by one through adverse possession.[2] The Mitākṣarā explains that neglect to watch over his property is excusable for the king on account of his multifarious duties.[3] In modern jurisprudence though the right of government is extinguished by adverse possession, yet its position is more favourable than that of a private owner inasmuch as the period of limitation for the former is sixty years and for the latter only twelve years. *Śrotriyas* are absorbed in spiritual studies, take part in learned disquisitions and instruct people. They may thus be naturally unmindful to worldly concerns and so will not lose the property held adversely against them.[4] The principle underlying the various cases of exception evidently is that possession in order to be able to lead to ownership must be as of right and not held under leave or license. It is interesting to note that this principle is adopted in other systems of jurisprudence also and is not peculiar to the Hindu law.

Exceptions are also made in the case of intermediate boundary as well as in the cases of *ādhi*, *upanidhi*, *nikṣepa* and *strī*.[5] Medhātithi remarks that on account of the boundary

[1] Manu VIII. 149, Yāj. II. 25, Nār. I. 81.

[2] देशेश्वरा राजानस्तेषां धनं ते हि महाधनत्वादुद्यत्वान्वयं धनमन्विच्छन्तो विस्तभेदादिभिर्निधनीक्रियन्ते ।
—Medh. on Manu VIII. 149.

[3] राज्ञो बहुकार्यव्याकुलत्वात्—Mit. on Yāj. II. 25.

[4] श्रोत्रियस्याध्ययनाध्यापन-तदर्थविचारानुष्ठानव्याकुलत्वादुपेक्षा युक्तैव ।—Mit. on Yāj. II. 25.

[5] Manu VIII. 149, Yāj. II. 25, Nār. I. 81.

mark between villages being a public concern men may naturally ignore encroachment upon it. As to the boundary line between houses marked by ditches or walls two or three cubits in size and common to two persons, the fact of its being in possession of one of them can be ignored by the other if such possession is short. Possession for a long period may give rise to the presumption that the ownership has passed to the possessor by reason of gift or any other mode of acquiring property but it will even then not be very harmful, for, Medhātithi goes on to say, the son and the grandson of the person who omitted to protest against such a possession will easily be able to discover some hidden marks of the original boundary and thereby have their claims established.[1] Vijñāneśvara also puts forward similar grounds. He says that neglect to watch over the boundaries may be allowed for the simple reason that they can easily be ascertained by permanent boundary marks of chaff, ashes or other articles.[2] *Strī* means a slave girl or wife.[3] What is intended by Manu's text is that she can never be lost to the original owner through adverse possession.

Exceptions in the cases of *ādhi*, *upanidhi* and *nikṣepa* amply prove the adoption by our law-makers of the principle that prescription cannot be caused by derivative possession. *Ādhi* (pledge) has been defined by Nārada as that to which a secondary title is created,[4] Medhātithi explains the term more fully. According to him *ādhi* is 'an article given as pledge,—such as cattle, land, gold and so forth—to the creditor and recovered from him upon repayment of the debt.'[5] The

[1] Medh. on Manu VIII. 149.

[2] Mit. on Yāj. II. 25.

[3] स्त्रियो दास्यो भार्या वा (Medh.). Asahāya explains the term as 'निक्षेपभूता या भुक्ता,' *i.e.*, 'a woman who has been delivered to a stranger as a deposit, and enjoyed by him.'

[4] अधिक्रियत इत्याधिः—Nār. I. 124. अधिक्रियते अन्यधनिना सम्बन्धाधिकारमानीयते इत्याधिः (Asahāya).

[5] आधीयत इत्याधिर्बन्धकद्रव्यं गोभूहिरण्यादुच्यते—Medh. on Manu VIII. 149.

Mitākṣarā also makes it clear that *ādhi* is nothing but a security given by the debtor for the thing lent to him by the creditor for the purpose of creating confidence in the latter.[1] Both *upanidhi* and *nikṣepa* are deposits. The difference between the two is that the former is enclosed in a vessel, its quantity, kind and form are not disclosed and it is sealed; while the latter is specified as to its quality and quantity.[2] We may thus call *upanidhi* a sealed or unspecified deposit and *nikṣepa* a specified deposit.

We may conclude this chapter by saying that some of the views about the effect of an adverse possession noted above have their parallel in other systems of jurisprudence. The doctrine of extinctive prescription, it is needless to say, represents a very developed stage of *bhuktivāda* and shows a sentiment of great respect for the fact of possession. The Roman law also reveals the same state of things by recognising that title is extinguished by prescription. Savigny making a statement about the origin of property in the Roman law has gone so far as to say that all property is founded on adverse possession.[3] It is indeed interesting to note that the Roman law just like the Hindu law made a difference between the periods of prescription as regards movables and immovables. In its earliest phase a prescriptive title to movables was acquired by one year's possession and to immovables by possession for two years. In

[1] आधिर्नाम ग्रहीतस्य द्रव्यस्योपरि विश्वासार्थमधमर्णेनोत्तमर्णोऽधिक्रियते आधीयते इत्याधिः।
—Mit. on Yāj. II. 57.

[2] स्वद्रव्यं यत्र विश्रम्भान्निक्षिप्यत्यविशङ्कितः।
निक्षेपो नाम तत् प्रोक्तं व्यवहारपदं बुधैः॥
अन्यद्रव्यव्यवच्छिन्नं द्रव्यमव्याहृतं च यत्।
निक्षिप्यते परस्यर्द्धौ तदौपनिधिकं स्मृतम्॥—Nār. II. 1 and 5 (उपनिधिप्रकरणम्).
असंख्यातमविज्ञातं समुद्रं यन्निधीयते।
तज्ज्ञानीयादुपनिधिं निक्षेपं गणितं विदुः॥—Nār. quoted in Mit. on Yāj. II, 64.

[3] Maine's Ancient Law, Ch. VIII.

Justinian's time these periods were extended to three and ten years respectively. In the Roman law the general rule, of course, was that a title to the thing possessed could be acquired by one who obtained possession in good faith and under a sale, gift or other just means of acquiring property. When, however, the possessor had come in under no title the Roman law did not totally ignore his right but demanded a longer prescription of thirty years in case of certain class of properties and of forty years in case of others. Another point to be noted is that the Roman law also required a possession to be peaceable and uninterrupted for the period prescribed. We have seen that under the Hindu law prescription could not be claimed against properties stolen or possessed by force. By the Roman law also things stolen or possessed by violence were considered so far *extra commercium* that they could not be acquired by the ordinary prescription even by a *bona fide* possessor.[1]

We have seen that according to some authoritative texts of the Hindu law there are shorter prescriptions which are applicable to certain classes of property. This has a striking similarity with the modern French Code. It is also interesting to note that in this system of jurisprudence in order to prescribe the property of an immovable subject one is to acquire it in good faith and upon an ostensible title and a title defective in form cannot serve as a basis for prescription. This is *āgamavāda* pure and simple of the Hindu law. The French law further recognises that all real and personal actions are barred by the lapse of a certain period of time.[2] This also is not very different from the theory of *vyavahārahāni* of the Hindus noted above.

Another point that we have noticed is that adverse possession does not operate against minors and those who are under any legal incapacity to sue. The English and the Scottish law of prescription recognises exactly an identical

[1] Roman Law (Lord Mackenzie), Ch. VIII, pp. 194-196.
[2] Roman Law (Lord Mackenzie), Ch. VIII, p. 198.

principle. The text of Yājñavalkya, we have further noticed, does not, according to some authorities, advocate extinction of title or bar the remedy by action but is intended '*to limit the mode of proof*' so that claims which might be proved within the period of prescription by legal evidence such as witnesses and documents can only be established after the expiry of that period by having recourse to oath and ordeal. An exactly similar view is held by the Scottish law also.[1]

These resemblances, though accidental, go to show that our system of law does not suffer by comparison and may be placed side by side with any system of law in the world.

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[1] Roman Law (Lord Mackenzie), Ch. VIII, pp. 198-201.

CHAPTER IV

Ordeal

As has already been noticed, the earlier treatises on law do not give much importance to the subject. Ordeals by fire and water are mentioned by Manu in an indistinct manner.[1] Āpastamba recommends the employment of a divine test in a general way without adding any particulars.[2] Gautama, Vasiṣṭha and Bodhāyana are silent about its application. Elaborate rules about ordeal are laid down by Yājñavalkya, Viṣṇu and Nārada and these authorities more or less agree with one another. Yājñavalkya prescribes ordeals only in cases where human means of proof are wanting.[3] He further limits the use of ordeals by saying that they are normally to be applied when the complainant binds himself to accept the appropriate penalty himself if the accused can prove his innocence.[4] There are two exceptions, however, to this limitation—first, in cases of treason, robbery, intercourse with robbers and great sins (like the murder of Brāhmaṇas), and secondly, when a person wants to prove his purity or when he happens to be a servant of the king.[5] It is laid down that in such cases ordeal may be imposed even without the other party undertaking to pay the penalty. Viṣṇu recommends the application of ordeals in cases of a criminal action directed against the king, of violence, of the denial of a deposit or of theft and robbery.[6] Nārada distinguishes between cases in which ordeals should be employed and which can be settled by other means of proof. According to him also ordeals are

[1] VIII. 114-116.
[2] II. 11. 29. 6.
[3] II. 22.
[4] II. 95.
[5] Yāj. II. 96.
[6] Viṣ. IX. 1 and 2.

necessary only in the absence of oral and documentary evidences, and are never to be resorted to when it is possible to decide a case with the help of such evidences. He distinctly says—'where a transaction has taken place in day-time, in village or town or in the presence of witnesses, divine test is not applicable.'[1] It is applicable only where the transaction has taken place in a solitary forest, at night or in the interior of a house or in the cases of violence or of the denial of a deposit.''[2] Asahāya comments that for all heavy charges where any and every matter is denied or declared false, this rule for the performance of ordeal will apply.[3] Vijñāneśvara insists that in such cases also ordeals should be applied when human means of proof cannot be had. He further tells us on the authority of Kātyāyana that if the complainant and the defendant insist on the employment of two different kinds of proof, *i.e.*, if one is prepared to undergo an ordeal and makes a prayer to that effect and the other prays to be allowed to produce witnesses, the judge should show preference to the latter's prayer. Not only this. Vijñāneśvara further expresses the opinion that if there is human evidence to establish only the principal part of a claim, then also divine test should not be resorted to for the proof of the rest. Thus in a case of denial of a claim for one hundred pieces of silver borrowed with interest, if there be witnesses to prove the actual taking of the sum by the defendant but neither the number nor the rate of interest and thus if the claimant offers to prove these two by means of ordeal he will not be allowed to do so. Here also Vijñāneśvara has for his authority a text of Kātyāyana which declares 'if human mode of proof is applicable even to a part of the case, that is to be received in preference; in such a case a divine test should be avoided though it may prove the whole.' In such cases the proof of a part will amount to the proof of the whole on the

[1] Nār. II. 29.
[2] Nār. II. 30.
[3] तथा ये केचिदर्थास्तेषामपह्नवेषु—Asahāya on Nār. IV. 242.

principle of *ekadeśa* proof.[1] These general rules, however, have their exceptions and we know this from what Bṛhaspati and Kātyāyana say. According to Bṛhaspati the charges relating to heavy crimes and appropriation of deposits are absolutely under the domain of ordeals and witnesses have no scope there.[2] He says further that a forger of gems, pearl or coral, one withholding a deposit, a ruffian and an adulterer shall be tested by oaths and ordeals in every case.[3] He holds also the view that the test of ordeal is to be applied when a doubt arises with regard to a document or oral evidence, when the proof of *anumāna* (inference) fails and when the witnesses have disappeared or are all of them perjured.[4] Kātyāyana, too, in full agreement with Bṛhaspati says that witnesses should not be examined and trial should be conducted solely by having recourse to an ordeal in charges of murder and violence of a grave character.[5] According to him divine test is to be applied in those cases also in which the evidences produced by both the complainant and the defendant are equally strong.[6] It is interesting to note that he recommends also the optional use of ordeal and all kinds of human proof in lawsuits relating to debt, and of ordeal and witnesses only in such offences as abuse, assault and the employment of forcible means (to recover a debt or to take possession of a piece of land belonging to another.[7] There are texts of Kātyāyana, Pitāmaha and Bṛhaspati which strictly forbid the application of ordeals in disputes regarding landed properties as well as in charges of the use of offensive language.[8] Devaṇabhaṭṭa comments that if there be no human mode of proof, then such cases should be decided by circumstantial evidence and if that is

[1] Mit. on Yāj. II. 22.

[2] Sc., p. 121.

[3] Vīram., p. 114.

[4] Vīram., p. 114.

[5] Vīram., p. 114, Pds., p. 90, V. loka (in manuscript).

[6] समलं साक्षिणां यत्र दिव्यैस्तत्रापि शोधयेत्—Pds., p. 90.

[7] Pds., p. 99.

[8] Sc., p. 121.

also not found possible the order of the king will decide them.[1]

There are principally five kinds of ordeal. Ordeal by balance, by fire, by water, by poison and fifthly, by consecrated water. Other kinds of ordeal are by grains of rice, by a hot piece of gold, by ploughshare and by *Dharma* and *Adharma*.[2] For a detailed account of each and every form of these ordeals we should refer the reader to the *smṛtis* of Yājñavalkya, Viṣṇu, Nārada, Bṛhaspati as well as to the article on 'ordeal' in the Encyclopaedia of Religion and Ethics.

The ordeal is generally to be performed by the defendant. This is the opinion of Viṣṇu, Kātyāyana and Pitāmaha.[3] But Yājñavalkya and Nārada allow it to be performed by the plaintiff also if the defendant takes the punishment on himself in case of defeat.[4]

In administering an ordeal to a person his caste, personal conditions and the time of the year should be taken into consideration. According to Nārada the ordeals by balance, fire, water and poison are to be given to Brāhmaṇa, Kṣatriya, Vaiśya and Śūdra respectively.[5] Kātyāyana says, however, that all the ordeals may be applicable to all castes but he adds a prohibition of poison in the case of Brāhmaṇas.[6] Nārada says further....." the distressed shall not be caused to undergo the ordeal by water, nor shall poison be given to the bilious, nor shall the ordeal by fire be administered to persons afflicted with leprosy or with blindness or with bad nails." "An ordeal

[1] अत्र मानुषासम्भवे हेतुना निर्णयः तदसम्भवे राजाश्रया—Sc., p. 121.

[2] Yāj. II. 95, Nār. IV. 252, Vīram., p. 225. [3] Viṣ. IX. 21.
अभियुक्ताय दातव्यं दिव्यम् (Pitāmaha)—Vīram., p. 228.
अभियुक्ताय दातव्यं दिव्यं दिव्यविशारदैः (Kāt.)—Sc., p. 224.

[4] Yāj. II. 96. इच्छया त्वितरः कुर्यादितरो वर्तयेच्छिरः (Nār.)—Sc., p. 225.

[5] Vīram., p. 235.

[6] सर्वेषु सर्वदिव्यं वा विषवर्जं द्विजोत्तमे—Vīram., p. 235.

should never be administered to persons engaged in performing a vow, to those afflicted with a heavy calamity, to the diseased, to ascetics or to women, if the dictates of justice are listened to." "During the rains let the ordeal by fire be administered. In the autumn season the balance is declared to be the proper kind of ordeal. The ordeal by water should be applied in summer and the ordeal by poison in the cold weather." [1] Similar, if not identical, restrictions are imposed on the use of ordeals by Viṣṇu and Bṛhaspati as well.[2]

The method of trial by ordeal is undoubtedly fraught with danger. Nevertheless the system has been practically universal during a long period of social evolution. It was in vogue among the people of Europe who, however, abandoned it after the medieval age. The Malaya laws direct that ordeal shall be used in the absence of evidence. In West Africa ordeal is preferred to witnesses. The early Teutonic peoples knew nothing of evidence or trial proper but depended solely on oaths and ordeals.[3]

The chief field of the application of ordeals has been India. It will be interesting to know that as late as 1783 A.D. two cases were tried by the Chief Magistrate of Benares with the help of ordeals. The details of these ordeals which were carried out in accordance with the precepts of the *smṛtis* are recorded in the 'Asiatic Researches,' Vol. I. The continuity of the system is also illustrated by the fact of its having been in use among the Marathas.[4]

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[1] Nār. IV. 254-256. [2] Viṣ. IX. 23-32, Vīram., p. 230.

[3] Article or 'Ordeal' in the Encyclopaedia of Religion and Ethics, Vol. IX.

[4] Administrative System of the Marathas (S. N. Sen), p. 326.

CONCLUSION

In the foregoing chapters I have tried to present a systematic exposition of the broad principles of the Hindu Law of Evidence. Some points of its excellence have already been noted and it is useless here to recapitulate them. In promulgating the law our sages were guided by a lofty idea of *dharma* and not merely by the policy of expediency. They were nevertheless not dreamers. The laws laid down by them were meant for practical purposes. We have records of some cases [1] and it deserves to be noted that the procedure adopted in each of them was almost identical and everything done was in strict accordance with the injunctions of the sages. It could not be otherwise for the simple reason that our system does not know any such thing as judge-made law ; all it knows is the codified law. It is true that our law was not perfect and entirely free from defects, but it must be admitted that it was remarkably comprehensive and logically consistent. In judging the merits and demerits of our law we should look to its guiding principles and not to mere errors in detail.

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1 Srīdhara *vs.* Mātridhara (recorded in the commentary of Asahāya on Nār. III. 6).

Tularam *vs.* Maniram (C. W. Notes, Vol. XXIV, No. 37).

See also Mṛcchakaṭika, Act IX (Cārudatta's trial).

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